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*John F. Alexander*









**English Ruling Cases**

CITED "E. R. C."

CONTINUED BY

**British Ruling Cases**

CITED "B. R. C."

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*The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.*

# **English Ruling Cases**

ARRANGED, ANNOTATED AND EDITED

BY

**ROBERT CAMPBELL, M. A.**

OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

**IRVING BROWNE**

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VOL. XIV.

INSURANCE—INTERPRETATION

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**EXTRA ANNOTATED EDITION  
OF 1916**

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# RULING CASES.

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## INSURANCE.—(*Continued.*)

### SECTION VI. Construction.

- (1) General Rules.
  - (2) Implied Warranties and Conditions.
  - (3) Express Warranties and Exceptions.
  - (4) Valued Policy.
  - (5) Suing and Labouring Clause.
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### SECTION VI.—*Construction.*

#### (1) GENERAL RULES.

No. 52.—ROBERTSON *v.* FRENCH.

(K. B. 1803.)

#### RULE.

POLICIES of Insurance are construed by the same rules as other instruments; unless where by the known usage of merchants and shipowners certain words have acquired for the purposes of these contracts a peculiar sense distinct from the ordinary and popular sense.

In case of doubt occasioned by an apparent discrepancy between the words superadded in writing and the printed form in which they are inserted, the written words, as being selected by the parties for the expression of their particular meaning, have the greater effect.

#### Robertson and Thompson *v.* French.

4 East, 130-142 (7 R. R. 535).

*Insurance.—At and from . . . beginning from loading at B.—General Rules of Construction.*

Where by a policy of insurance ship and goods were insured “at [130] and from all and every port, &c., on the coast of Brazil, and after the 17th September to the Cape of Good Hope, beginning the adventure upon the goods

## No. 52.—Robertson v. French, 4 East, 130, 131.

from the loading thereof aboard the said ship at all or every port, &c., on the coast of Brazil, and from the 17th September, 1800, and upon the ship in the same manner," with liberty to sail to, &c., any places backwards or forwards under the Portuguese government, &c., at a premium of four guineas per cent, to return £3 10s. should the ship have arrived or the risk have otherwise ceased on or before the 17th of September. *Held*, that the policy could only have attached on homeward-bound cargo laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. Neither did the policy cover the ship itself, which was insured in the same manner as the goods—and no goods having been laden on the coast of Brazil. Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the Register Acts. And *held*, that such parol evidence of ownership, arising from possession at a particular period, was not disproved by showing a prior register in the name of another and a subsequent register to the same person.

This was an action on a policy of insurance<sup>1</sup> effected by the plaintiffs as agents, "lost or not lost, at and from *all, any, or every port and place where and whatsoever on the coast of Brazil, and after the 17th day of September to the Cape of Good Hope*, upon any kind of goods and merchandises, and also upon the body, &c., of the ship *Chesterfield*, &c.; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, *at all, any, or every port and place where and whatsoever on the coast of Brazil, and from the 17th day of September, 1800, and upon the said ship, &c., in the same manner*; and so shall continue and endure during her abode there upon the said ship, &c., and further until the said ship, &c., and goods, &c., shall be arrived at Simon's Bay or Table Bay, both or either, with liberty to call at St. Helena or elsewhere, upon the said ship, &c., and upon the goods, &c., until the same be there discharged, &c. And it shall be lawful for the said ship, &c., in this voyage to proceed

and sail to and touch and stay at any ports or places [\* 131] whatsoever, particularly backwards and forwards, \* and to and from those under the Portuguese government, or any port, place, island, or elsewhere on the coast of South America, without being deemed any deviation, and without prejudice

<sup>1</sup> The words in italics were written; the rest of the policy set out was in the usual printed form.

## No. 52.—Robertson v. French, 4 East, 131, 132.

to this insurance. The said ship, &c., goods, &c., valued at £15,680, *being upon goods, ship, and freight separately valued as under.* And in case of capture, detention, or seizure, by any power whatever, to pay a total loss upon receiving documents of her being carried into port, and without inquiry into the regularity or irregularity of her proceedings; and with liberty to sell, barter, exchange, load, or unload the interest in part or whole at the island St. Catharine, or elsewhere, where and whatsoever. Touching the adventures and perils, &c. [This part of the policy was in the common form.] At the rate of four guineas per cent, to return three pounds and ten shillings should the ship have arrived or this risk otherwise have ceased, on or before the 17th of September. In witness, &c." At the bottom of the policy, the goods were valued at £13,316; ship at £1550; and freight at £814. The plaintiffs declared as agents of Robertson and Walker, upon a loss by the arrest and restraint of the King's ships. And at the trial<sup>1</sup> before Lord ELLENBOROUGH, Ch. J., at the sittings after last Hilary Term, at Guildhall, it was admitted that the goods were of the value insured, and had been put on board the ship *Chesterfield* at the Cape of Good Hope. Much of the evidence turned upon the question, Whether the object of the voyage were to trade with the Spanish settlements in South America; Spain being then at war with \*this [\*132] country? or Whether it were only in contravention of the trading laws of Portugal? But nothing turned upon that point in the case as presented for the consideration of this Court.

It is sufficient to state, that after the cargo had been taken in at the Cape of Good Hope, the ship went from thence, on the 7th of February, 1800, to Benguela, on the coast of Africa, and afterwards to St. Catharine's, on the coast of Brazil, on the 30th of May; then to Rio Janeiro on the 27th of July; stayed there upwards of two months, and remained on the coast till the latter end of November, when, on suspicion of illicit trading with the Spanish enemy, she was taken possession of by some of His Majesty's ships of war, and carried again to the Cape, with the orig-

<sup>1</sup> Upon the first trial, the plaintiff was consulted on the opening of his counsel at Guildhall, it being stated that the goods were put on board at the Cape of

Good Hope, and not on the coast of Brazil. The Court, for the purpose of having the whole case before them, awarded a new trial; and this was the second trial.

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inal cargo on board, where she was libelled by the captors in the Vice-Admiralty Court there, on which the assured abandoned to the underwriters; and the ship, after being liberated by the sentence of the Court, was sold there, and has since arrived in England about October, 1802.

On the part of the plaintiffs another policy, subscribed by this defendant, was offered in evidence, as being on the same subject-matter, between the same parties, and on the same continued risk; for the purpose of showing that, in point of fact, the defendant had contracted with the present plaintiffs to insure the same subject from the 17th of March to the 17th of September, 1800, being the period of the commencement of the present policy as to time. This was objected to on the part of the defendant, on the ground that the one policy could not be read in explanation of the other; and Lord ELLENBOROUGH only admitted it as evidence of the fact of such a policy having been effected. With

respect to the plaintiffs' title to the ship, the evidence, [\*133] upon which the objection was founded by the \*defendant's counsel, was that of Captain Brooks, the commander of the ship *Chesterfield*; who proved that at the Cape of Good Hope he had sold her to Robertson and Walker, the two persons in whom the interest is averred to be; that he (Brooks) and Mortlock, the supercargo, had also shares in the ship, and that he was put in possession by one Lawrence Williams; that the power which he (Brooks) had to dispose of the ship was in writing; whereupon it was objected at the trial that no interest was shown in the parties interested in the insurance; for Brooks proved that they claimed by sale from him, which must be in writing by the Register Acts, and therefore the bill of sale should be produced. The defendant afterwards gave in evidence, for another purpose, the answer of the plaintiffs to a bill filed in Chancery; in which answer it appeared that Lawrence Williams was the owner of the ship when she left England. And he also read in evidence the sentence of the Vice-Admiralty Court at the Cape of Good Hope (now under appeal before the Lords of the Privy Council), by which the property in the ship was adjudged to be in the person claiming, to whom in the declaration it is averred to belong, and was directed to be restored to them, but that there was just cause of seizure at the time. It also appeared from the register-book of the Custom-house that up to April, 1799, L. Williams was

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the registered owner; and that in August, 1802, there was a subsequent register to the same person as sole owner; and that the ship was sold at the Cape under a decree of the Vice-Admiralty Court there. The plaintiffs recovered a verdict; and in the last term a rule *nisi* was obtained for setting aside the verdict and entering a nonsuit, upon two objections: 1st, with respect to the interest of the assured; and, 2d, that neither [\*134] ship nor the goods on board were covered by the policy in question. The case was argued at very great length by Erskine, Garrow, Park, and Giles, for the plaintiffs; and by Gibbs, Adam, and Marryatt, for the defendant. The greater part of the arguments having turned upon the critical and grammatical construction of the words of the policy, and the judgment of the Court touching upon the leading points, it is unnecessary to detail them here. The principal case adverted to, as illustrative of the meaning of the common printed words in a policy on goods, “beginning the adventure upon the said goods, &c., from the loading thereof aboard the said ship,” at, &c., was *Hodgson v. Richardson*, 1 Black. Rep. 463, which showed, as the defendant’s counsel insisted, that the policy only attached on goods actually put on board at the place named whereat the risk was to commence. On the other hand it was contended, that “from the loading thereof aboard,” &c., meant from the fact of the goods being on board at such a place; and that in the case mentioned, the fact being clear that the goods had been put on board at Leghorn, five months before, and not at Genoa, into which the ship had afterwards put after losing her convoy, and at which place the policy was to commence, if it had not been admitted on all sides that, *prima facie*, at least goods so circumstanced might be covered by the general words of the policy, the plaintiff must have been immediately nonsuited; and it was fruitless to inquire into the question of fraudulent concealment from the underwriter of the time during which the cargo, which was of a perishable nature, had been on board, and upon which the judgment of the Court ultimately turned.

*Cur. adv. vult.*

\* Lord ELLENBOROUGH, Ch. J., now delivered the judgment of the Court. This rule was moved for on the part of the defendant on two grounds: First, that the plaintiffs had not given sufficient proof that the interest in the ship was in Robert-

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son and Walker, in whom such interest is by the declaration averred to be. Secondly, that the policy on this ship and cargo never attached; the adventure on the cargo being by the terms of the policy made to commence from the loading the goods aboard the ship on the coast of Brazil—an event which, as it was contended by the defendant, never happened, inasmuch as the goods were not loaded there, but at the Cape of Good Hope. And it was also contended on the part of the defendant, that the adventure on the ship, being by the terms of the policy made to begin in the same manner with that on the goods, could of course have no commencement, if that on the goods never attached. [After stating the policy as before mentioned, his Lordship proceeded.]

In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases; it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade

or the like, acquired a peculiar sense distinct from the [\*136] popular sense of the same \*words; or unless the context

evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words ~~sup~~ <sup>sup</sup>raduled in writing (subject, indeed, always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general

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formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.

As to the first point made in this case on the part of the defendant, viz., that the ownership alleged was not sufficiently proved, it was proved by the captain (Brooks) in the ordinary way that the owners by whom, as such, he was appointed and employed were the persons in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers on cross-examination that the ownership was derived to those persons under a bill of sale executed by himself as attorney to one Lawrence Williams, the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale or the ship's register, or to give any further proof of such their property; the mere fact of their \* possession as [\* 137] owners being sufficient *prima facie* evidence of ownership, without the aid of any documentary proof or title-deeds on the subject, until such further evidence should be rendered necessary in support of the *prima facie* case of ownership which they made, in consequence of the abduction of some contrary proof on the other side. No such contrary proof was, however, in this case given on the part of the defendant. For the prior register in the name of Lawrence Williams as owner in 1799, and a subsequent register to the same person upon a sale at the Cape in 1802, under a decree of the Court of Vice-Admiralty, and which were given in evidence by the defendant, were perfectly consistent with a title in other persons in the mean time, agreeable to the averment in the declaration.

As to the second point made in this case, viz., that the policy on the ship and goods never attached, it is asserted on the part of the defendant that the adventure in question as to its commencement, according to the natural and obvious meaning of the language and terms of the policy, depends upon and is limited by the coexistence and concurrence of three several circumstances; viz., one of place, one of time, and one of event or fact. And first, of place, that it is to attach on the coast of Brazil; secondly, of time, that it should attach there after the 17th of September; and thirdly, of event, that the goods should have been then loaden at some port or place on the coast of Brazil. The adventure upon the ship is in terms declared to begin "in the same manner," i.e. at the time, and place, and after the happening of the events

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before described and specified in respect to the cargo. But it is argued on the part of the plaintiff's that the latter circumstance of event or fact, as I have termed it, does not affect the commencement of this adventure; and that the words "from

[\* 138] the loading thereof \*aboard the said ship" are either to be rejected wholly, in which case the policy will stand thus,

"beginning the adventure upon the said goods and merchandises at all, any, or every port and place where and whatsoever on the coast of Brazil," without regard to the place at which such goods may have been in fact antecedently laden; or that the words, "from the loading thereof aboard the said ship at," are to be understood from the time of the ship's being with the goods laden on board her, or having such her cargo on board her, at the place mentioned in the policy, *i. e.*, in this case, at the coast of Brazil. The objection to the first of these constructions (besides the difficulty of wholly rejecting words having an apparently significant meaning, and referring distinctly to an act to be done at a given place) is stated to be this, that if the cargo insured be understood to be generally a cargo at, or a cargo on board on the coast, and not one actually and originally taken in upon the coast, the policy would in that case cover the risk on two successive cargoes, *i. e.* on the outward cargo with which the ship should be in a loaded state on the coast after the 17th of September, and the homeward, or that which it should take in there; and that it would not be just towards the underwriter so to construe the words as to cover thereby at his risk two successive cargoes, when one original cargo only, according to all the ordinary usages of trade and practice of insurance as applied to such form of words must be understood to be meant, in addition to the liberty of sale, barter, and exchange, given by a subsequent part of the policy; and further, to reject emphatical words, in order to accomplish a construction so much to the apparent disadvantage

of the underwriter. And indeed if only one original

[\* 139] cargo were meant to be covered, a Brazil cargo appears \* to

have the best claim to be considered as that one. For it would be preposterous to consider the policy as meant, in preference to any other one cargo, to cover a cargo taken in at the Cape of Good Hope, and which should remain unprotected as far as this policy is concerned, wherever it should be, till the 17th of September, and from that day, if it were then on the coast of

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Brazil, should be protected there, and during the course of its barter, sale, and exchange at the island of St. Catharine and elsewhere, and during its reconveyance afterwards back to the Cape, from which it had originally proceeded. The same objection in a great measure applies to the second construction, which, without wholly rejecting the words "from the loading thereof aboard the said ship," considers the goods as the subject of insurance when, after the 17th of September, they should be in a loaded state at the coast of Brazil; for this construction would equally exclude the possibility of covering by this policy a homeward cargo taken in at the coast of Brazil to be carried to the Cape, provided the ship should have arrived on the coast of Brazil with an original cargo on board; unless, indeed, two successive cargoes could be covered by a policy conceived in these terms. But the most natural construction of the words, if the immediate letter of them were less directly applicable to a cargo taken in on the coast, seems to be to make them apply to a cargo to be carried to the *terminus a l' quem* upon and within the immediate limits of the voyage described in the policy, rather than to a cargo conveyed, as it should seem, in the course of useless circuitry from the place from which the ship originally proceeded before the voyage in question had commenced; continuing, except inasmuch as it might be altered by barter, sale, and exchange, on board during the voyage, and to be delivered \*at the [\* 140] place at which the voyage is at last appointed to terminate. But the question naturally occurs, Is there anything to be found in the policy which assigns to these words a sense thus apparently different from the ordinary grammatical sense of them? And looking, as we are obliged to do, to the policy, and to the policy alone, in order to collect the intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin in point of effect and construction the words, "at all or any port or place on the coast of Brazil," from the words, "from the loading thereof aboard the said ship," by which they are immediately preceded, and with which by immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken sentence of intelligible expressions all

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applicable to the same subject-matter, it might perhaps have been open to us to have given them a different meaning, and to have considered them as words written in the margin of the policy (and applying, therefore, indefinitely to the whole of the policy, and not to any particular part of it), are usually considered; that is, as controlling the sense of such parts of the printed policy to which, in sound construction, and by reasonable reference, they may appear to apply. As, for instance, where the word "ship" is written in the margin of the policy, or "freight," or "goods;" in such case the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that

one. And this is done in cases where the subject meant [<sup>\*141</sup>] to be insured is still more remote from \* "ship and goods,"

the only subjects of insurance in the printed policy; viz., where the object of the insurance, as declared by the marginal memorandum, is, money lent on bottomry or *respondentia*, or the like; the meaning of which marginal memorandum may be translated thus: We mean to insure the subject so named, "freight," for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy, as far as it may serve to effectuate this object, and no further. Had, indeed, the subject-matter of the insurance itself, or the character, situation, and description of the persons making it, or any other circumstance attending the insurance, pointed out and required a narrower rule of construction, the ordinary effect of these words might perhaps have been in such case controlled; but can any such restrictive rule of construction be applied to the words "at all, &c, ports and places on the coast of Brazil," as they occur here, without shaking the fundamental rules of construction as applicable to all deeds and instruments whatsoever? Feeling, therefore, the impossibility of assigning to these words any other place in or with reference to this contract than what the parties themselves have done, and feeling the impossibility of assigning to them in that place, and with the context which attends them, any other meaning than what they obviously and in their plain grammatical sense import, we are obliged to say that the adven-

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ture could only attach on goods and ship after a loading of goods had taken place on the coast of Brazil; and as that circumstance or event never took place in the present instance, [\* 142] that the policy, \* of course, never attached at all. It certainly was in the contemplation of the parties that the risk meant to be insured might have ceased before the 17th of September, 1800, and a return of premium is provided in that event; but I do not think that the construction of the rest of the policy is so materially affected by this stipulation as to require any particular observations upon it. Upon the whole we are of opinion that this rule, which calls on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered, must be made absolute.

*Rule absolute.*

## ENGLISH NOTES.

The passage of Lord ELLENBOROUGH's judgment (p. 6, *ante*)—“the same rule of construction . . . peculiar sense” is cited by BOWEN, L. J., in *Hart v. Standard Marine Insurance Co.* (C. A. 1889), 22 Q. B. D. 499, 501, 58 L. J. Q. B. 284, 286, 60 L. T. 649. 651, 37 W. R. 366, as an excellent exposition of the principle of construction which he applied to a warranty in a policy of insurance. The policy in that case was on ship, and contained the clause “warranted no iron . . . exceeding the net registered tonnage.” The warranty was held to be broken by carrying a quantity of steel in excess of the net registered tonnage. The Court held that iron, in the plain, ordinary, and popular sense, included steel; and if the object of the clause was looked to, steel was obviously within the object just as much as any other class of iron: and it was held not relevant to give evidence that in certain classes of contracts, such as contracts of sale and other contracts where the specific character of the goods was material, steel would not be described as iron. They distinguished the case from such cases as *Scott v. Bourdillion* (1806), 2 Bos. & P. (N. R.) 213, 9 R. R. 644, where the question was whether “rice” was to be considered as “corn” within the memorandum of a policy exempting the underwriters from a partial loss; and, where clear evidence was given of a usage applicable to the particular warranty, “rice” was not considered to be “corn.”

The same principle was applied by the House of Lords in *Birrell v. Dryer* (appeal from Scotland, 1884), 9 App. Cas. 345, 51 L. T. 130, where a time policy of insurance on ship contained the words “warranted no St. Lawrence between the 1st of October and the 1st of April.” The ship had navigated the Gulf of St. Lawrence during the prohibited

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period, but it was contended by the insured that the prohibition applied to the River St. Lawrence only. No general or local usage was shown to exist by which the warranty was to be construed. Evidence was, however, given to the effect that, during the months in question, the navigation of the River was more dangerous than that of the Gulf, although both River and Gulf were during that period accounted dangerous. The majority of the Court of Session had thought that the warranty was ambiguous, and ought to be construed strictly *contra proferentes*; and consequently that the underwriters were not discharged by the ship having navigated the Gulf. The House of Lords reversed this decision, holding that the evidence disclosed no ambiguity to prevent the application of the ordinary rules of construction; and that according to those rules the whole St. Lawrence navigation, both Gulf and River, were within the fair and natural meaning of the negative words, and was therefore prohibited during the months in question.

In a policy of insurance against loss by fire, the insurers agreed that so long as the insured should duly pay the sum of £7 10s. (being the half-yearly premium), and the trustees should agree to accept the same, the funds of the society should be liable. And it was further stipulated that the premium might be paid if *the trustees agreed to accept it* within fifteen days after the day limited by the policy; and “no insurance is to take place until the premium be actually paid by the insured.” The premises were burnt down after the expiry of the six months, but within the fifteen days. The renewal premium had not been paid at the time of the loss, but was tendered afterwards, and within the fifteen days. It was held that the insured could not recover. *Tarleton v. Staniforth*, and s. c. in error (1794), 5 T. R. 695, 1 Bos. & P. 471, 3 Anstr. 707, 4 R. R. 845. It is said that, in consequence of this decision, the Sun and other offices gave public notice that persons insured by policies for one year or longer were considered as insured for fifteen days beyond the time of the expiration of their policies (*Phillips Insur.* § 74 n). But in the subsequent case of *Salvin v. James* (1805), 6 East, 571, 8 R. R. 540, where an advertisement to this effect had been issued and treated as part of the policy, — the policy itself stipulating that the insurance was to continue so long as the insured should pay the premium and *the office should agree to accept it*, — the Court held that the office had still the right to determine the contract at the end of the year, and, as they had before the expiry of the year given notice to the insured that they would not renew except at a higher premium, that they had determined it; and that the premises having been burnt during the fifteen days without the higher premium having been paid, the insured could not recover. There are somewhat similar decisions

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in the case of life assurances in *Want v. Blunt* (1810), 12 East, 183, 11 R. R. 340; *Simpson v. Accidental Death Insurance Co.* (1857), 2 C. B. (N. S.) 257, 26 L. J. C. P. 289; *Pritchard v. Merchant & Tradesman's Mutual Life Assurance Society* (1858), 3 C. B. (N. S.) 622, 27 L. J. C. P. 169.

A life policy of insurance contained a proviso (*inter alia*) that in case “the assured should die by his own hands, or by the hands of justice, or in consequence of a duel,” the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he “voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but that at the time of committing the act he was not capable of judging between right and wrong.” The Court, by a majority, — MAULE, J., ERSKINE, J., COLTMAN, J., against TINDAL, Ch. J., *diss.*, — held that the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. *Borradaile v. Hunter* (1843), 5 Man. & Gr. 639, 5 Scott N. R. 418, 12 L. J. C. P. 225. This decision was followed by a majority of the Judges in the Exchequer Chamber in *Clift v. Schwabe* (1846), 3 C. B. 437, 17 L. J. C. P. 2, 2 C. & K. 134; and *Dufaur v. Professional Life Insurance Co.* (1858), 25 Beav. 559, 27 L. J. Ch. 817, in both of which “commit suicide” was held to be equivalent to “die by his own hands.”

Where no provision of the kind is contained in the contract, it has been held that the assurance is not, on any principles of public policy, void by reason of the suicide of the assured while in a state of insanity. *Horn v. Anglo-Australian and Universal Family Life Insurance Co.* (1861), 30 L. J. Ch. 511, 7 Jur. (N. S.) 673, 4 L. T. 142, 9 W. R. 359. But it is contrary to public policy for a person to benefit under an insurance, by his own crime; as was held in *Fauntleroy's Case (The Amicable Assurance Society v. Bolland)* (1830), 2 Dow & Clark, 1, 4 Bligh (N. S.), 194; and was assumed in *Cleaver v. Mutual Reserve Fund and Life Association* (C. A. 1891), 1892, 1 Q. B. 147, 61 L. J. Q. B. 128, 66 L. T. 220, 40 W. R. 230, where a husband having assured his life for the benefit of his wife, who was convicted of having murdered him, there was held to be a resulting trust for his benefit.

Upon the effect of the written, as distinguished from the printed words of the policy, a notable decision is *Hydernes Steamship Co. v. Indemnity Mutual Marine Insurance Co.* (C. A. 1894), 1895, 1 Q. B. 500, 64 L. J. Q. B. 353, 72 L. T. 103, fully cited in the notes to Nos. 32 and 33 of “Insurance,” 13 R. C. 584.

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## AMERICAN NOTES.

This case is cited in 1 May on Insurance, sects. 173, 175, 177, and repeatedly in Parsons on Marine Insurance, and in 1 Beach on Insurance, sect. 556, and in 1 Biddle on Insurance, sect. 567, and its doctrine approved.

The superior force of the written words to the printed is recognized in many cases: *Grandin v. Ins. Co.*, 107 Penn. State, 26; *Kratzenstein v. West. Ass. Co.*, 116 New York, 54; 5 Lawyers' Rep. Annotated, 799; *Plinsky v. Germania, &c. Co.*, 32 Federal Reporter, 47; *Liverpool, &c. Ins. Co. v. Van Os*, 63 Mississippi, 441; *Georgia II. Ins. Co. v. Jacobs*, 56 Texas, 366; *Schroeder v. Stock, &c. Ins. Co.*, 46 Missouri, 174; *Mobile M. D. & M. Ins. Co. v. McMillan*, 27 Alabama, 98; *Marie v. Conn. F. Ins. Co.*, 95 Georgia, 604; 51 Am. St. Rep. 102; *Goicoechea v. Louisiana S. Ins. Co.*, 6 Martin, N. S. (Louisiana), 51; 17 Am. Dec. 175; *Cushman v. Northw. Ins. Co.*, 34 Maine, 487; *Phœnix Ins. Co. v. Taylor*, 5 Minnesota, 492; *People's Ins. Co. v. Kuhn*, 12 Heiskel (Tennessee), 515; *Meagher v. Home Ins. Co.*, 11 Up. Can. C. P. 328; *Faust v. Am. F. Ins. Co.*, 91 Wisconsin, 158; 30 Lawyers' Rep. Annotated, 783; *Leeds v. Mechanics' Ins. Co.*, 8 New York, 351, citing the principal case. "Whenever they come into conflict, the written clause as expressing the special agreements and declared intention of the parties at the time of the contract must prevail, and the printed parts of the policy be held subordinate." *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y. Super. Ct.), 623.

The subordination of the printed to the written clauses is uniformly recognized in this country in insurance against fire of articles "usually kept," and the like, when a subsequent printed clause excepts some articles usually so kept, and especially such as are necessary in the prosecution of the business of the insured. *Faust v. Am. Ins. Co., supra*, and cases there cited.

An interesting limitation of this doctrine was made in *Liverpool & L. & G. Ins. Co. v. Orr*, 63 Mississippi, 431; 56 Am. Rep. 810. The policy insured in the written clause, "general merchandise consisting of dry goods, clothing, and groceries," but the printed provisions excluded gunpowder. The Court held that the policy was rendered void by the keeping of gunpowder, in the absence of evidence that gunpowder is usually regarded as "dry goods" or "groceries."

The case of *Lancaster F. Ins. Co. v. Lenheim*, 89 Penn. State, 497; 33 Am. Rep. 778, seems, as the present writer said in a note, 33 Am. Rep. 781, "opposed to the weight of authority." The policy insured, in the written part, "general merchandise of all kinds usually kept in a country retail store," with a printed prohibition of turpentine and benzine. It was held that the keeping of those articles avoided the policy, although they might have constituted part of the usual stock kept in such stores. The editor cited cases to the contrary from New York, Massachusetts, Michigan, Iowa, Minnesota, Missouri, North Carolina, South Carolina, and even Pennsylvania, and observed: "Suppose the written clause had included all the usual articles of the stock of a country store, specifically naming them all, including turpentine and benzine, and then in the printed portion had excepted and prohibited turpentine and benzine; would it be contended that the insurance did not

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cover turpentine and benzine? In the policy in question, turpentine and benzine was as effectually included in the written clause if they form part of the usual stock of a country store, as if they had been specifically named."

In regard to the construction of insurance policies, Mr. May says (1 Ins., sect. 174): "The spirit of the rule is that where two interpretations equally fair may be given, that which gives the greater indemnity shall prevail." And in spite of some expressions which might indicate a broader rule, it would seem that the general American doctrine is that insurance contracts are to be construed like all others, except in cases of ambiguity, and then most favorably to the insured. So in *MERCHANTS' INS. CO. v. EDMOND DAVENPORT & CO.*, 17 Grattan (Virginia), 144, after quoting from *Pelly v. Royal Ex. Assurance Co.*, 1 Burr. 349, the Court continued: "Where words of doubtful or ambiguous import are used in the policy, it has been decided in the case of *Dole and another v. New England Mutual Marine Insurance Company*, 6 Allen [Mass.], 373, that 'that interpretation is to be adopted which is most favorable to the claims of the insured under the policy. This is the ordinary and familiar rule applicable to the construction of all policies of insurance. It is founded on the consideration that the contract being one of indemnity to the assured, it is most consonant to the intent of the parties to construe it so that the extent of the indemnity shall be as great as a just interpretation of its terms will fairly admit; but that this salutary and well-established rule of interpretation can have no application where the terms of the policy are clear and unambiguous.' Alluding to this principle of favor to the assured, PARKER, J., in *Hood v. Manhattan Fire Insurance Company*, 1 Kern. R. [11 New York], 532, says: 'Where the words are not ambiguous, and the expression of the intent of the parties is full, I know of no reason why they should be excepted from the general rules of law applicable to the construction of all contracts.'" Then quoting from Lord MANSFIELD in the principal case, the Court continued: "From this collation and comparison of authorities, therefore, I am content, for all the purposes of this case, with Parsons' practical conclusion, that 'contracts of insurance are to be construed accurately, and neither severely nor liberally, and without favor to either party.' 2 Parsons' Maritime Law, 49." The passage quoted from Parsons is founded on the principal case, and fortified by *Mumford v. Hallett*, 1 Johnson (N. Y.), 433; *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S. Sup. Ct.), 419; *Honnick v. Phoenix Ins. Co.*, 22 Missouri, 82. In the New York case cited in the opinion above, the decision was that an insurance on a vessel on the stocks in process of building did not cover timber in the yard, and not incorporated, although fitted for it and for no other vessel. In *Dow v. Hope Ins. Co.*, 1 Hall (N. Y. Super. Ct.), 175, the Court said: "But a just regard must be had to the language which the parties employ, and no strained or unnatural sense must be ascribed to it, unless from necessity, to the prejudice of the rights of either party;" and it was held that insurance on goods outward and on their "proceeds home" did not cover the same goods on the return voyage. Chief Justice MARSHALL said, in *Yeaton v. Frye*, 5 Cranch, 335 (U. S. Sup. Ct.): "Policies of insurance are generally the most informal instruments which are brought into Courts of justice; and there are no instruments which are

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more liberally construed in order to effect the real intention of the parties, if that intention can be clearly ascertained;” and the decision was that where insurance was “against all risks, blockaded ports and Hispaniola excepted,” a vessel sailing ignorantly for a blockaded port is covered by the policy, “risk” being the controlling phrase, and not ambiguous. In *Hoose v. Prescott Ins. Co.*, 84 Michigan, 309; 11 Lawyers’ Rep. Annotated, 341, the Court observed: “The rules in the interpretation of such warranties are the same as those which apply to the interpretation of other mercantile contracts. All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation, and wherever in a policy of insurance there is a clear breach of the warranty contained therein, however immaterial it may be, the policy will be avoided.”

The doctrine that ambiguities shall be resolved most strongly against the insurer finds support in *Western Ins. Co. v. Cropper*, 32 Penn. State, 351; *Schroeder v. Trade Ins. Co.*, 109 Illinois, 157; and so in regard to “change of occupation,” the Court used language, in *Brink & Co. v. Merchants’ & M. Ins. Co.*, 49 Vermont, 457, which might seem to go further, but really concerned an ambiguity, when they said: “It is a fundamental rule in the law of insurance, that the policy shall be construed most strongly against the insurer and liberally in favor of the assured. The policy is written by the insurers. They use their own language, and surround and barricade their liability under it with such defences as they choose to adopt. Oftentimes their policies, instead of being simple, intelligible instruments that the average holder can understand and construe, are burdened with a great number of technical stipulations and conditions, buried under ingenious phraseology that reflects great credit upon the draughtsman, but leaves ‘plain people’ to learn its true import after their property is destroyed. Then they are informed that their policy is a mere technical notice of special matter to be given in evidence in answer to their claim for damages. There is obvious reason for the rule of liberal construction in favor of the man whose legal rights are to be extracted from such a labyrinth of mysticism.” Consult *Minneapolis T. M. Co. v. Firemen’s Ins. Co.*, 57 Minnesota, 35; 47 Am. St. Rep. 572; *Boright v. Springfield F. & M. Ins. Co.*, 34 Minnesota, 352 (question of punctuation); *Liverpool, &c. Ins. Co. v. Orr*, 63 Mississippi, 431; 56 Am. Rep. 810; *Goddard v. Ins. Co.*, 67 Texas, 69; 60 Am. Rep. 1; *Northwestern L. Ins. Co. v. Ross*, 63 Georgia, 199; *Agricultural Ins. Co. v. BeMiller*, 70 Maryland, 400; *Tewtonia Ins. Co. v. Boylston M. Ins. Co.*, 20 Federal Reporter, 148; *Burkheiser v. Mut. Ac. Ass’n*, 61 ibid. 816; 18 U. S. App. 704; 23 Lawyers’ Rep. Annotated, 112 (citing *First Nat. Bank of Kansas City v. Hartford F. Ins. Co.*, 95 United States, 678; *Grace v. Am. Cent. Ins. Co.*, 101 ibid. 282; *Moulor v. Am. L. Ins. Co.*, 111 ibid. 341; *Travelers’ Ins. Co. v. McConkey*, 127 ibid. 636; *West. & A. P. Lines v. Home Ins. Co.*, 145 Penn. State, 346; 27 Am. St. Rep. 703. The sum of all the authorities is concisely stated by Mr. Justice HARLAN in the *McConkey* case: “The Court must give effect to its provisions according to the fair meaning of the words used, leaning however—where the words do not clearly indicate the intention of the parties,—to that interpretation which is most favorable to the insured;” citing

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the case in 95 U. S., and *Anderson v. Fitzgerald*, 4 H. L. 484; *Fowkes v. Manchester, &c. L. A. Ass'n*, 3 B. & S. 917. See also *Ætna Ins. Co. v. Jackson & Co.*, 16 B. Monroe (Kentucky), 262 (where the Court said: "Common justice requires that the consequences of the failure should fall on the party who under the circumstances might and should have removed the ambiguity"); *Wilson v. Conway F. Ins. Co.*, 4 Rhode Island, 150; citing *Anderson v. Fitzgerald, supra*.

An instructive instance of construction of ambiguity in favor of the insured is afforded by *Potter v. Ontario, &c. Ins. Co.*, 5 Hill (N. Y.), 147. The policy provided that in case of further insurance the insured was to give notice to the company, and "have the same indorsed on the policy or otherwise acknowledged and approved by the company in writing." The insured gave notice in writing of further insurance, and the company by a letter acknowledged receipt of "your notice of additional insurances." The Court held this to be an approval in writing, on the ground that the company must have intended the insured so to understand it, and this is controlling in all cases of documents admitting of more senses than one. "Honesty and fair dealing forbid" the contrary view. In *West. & A. P. Lines v. Home Ins. Co., supra*, the insurance was on a tank of oil, described as located in a certain place, and it was held that its removal several hundred feet by a flood did not operate as a breach of warranty; citing *Sillem v. Thornton*, 3 El. & Bl. 868.

"Courts being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured, and strictly against the insurer;" *Alabama G. L. Ins. Co. v. Johnston*, 80 Alabama, 467; 60 Am. Rep. 112. (But this is a general rule of construction.) So in *Miner v. Benefit Ass'n*, 63 Michigan, 343: "Forfeitures of policies of insurance are not to be favored. The beneficiaries under them are perhaps we may safely say, in two-thirds of the cases, persons not learned in the technicalities of the language in which they are not unfrequently couched; and in construing them, Courts will, whenever a forfeiture is claimed, preserve if possible the equitable rights of the holders." See also *Phoenix Ins. Co. v. Spiers*, 87 Kentucky, 285; *Duran v. Standard L. Ins. Co.*, 63 Vermont, 437; 25 Am. St. Rep. 773.

In *Cross v. Shulliffe*, 2 Bay (So. Car.), 220; 1 Am. Dec. 645, a vessel was insured on a voyage from Charleston to the Cape de Verde Islands, and thence to the coast of Africa. She sailed directly to Africa, without stopping at the Islands. This was held not a deviation to avoid the policy, as the stopping was merely permissive, and the omission was for the benefit of the insurer. The Court said that the custom of vessels would have warranted stopping there for water, provisions, and refreshments, without express provision, and that "in the construction of policies of insurance, the intent and meaning of the parties are to be regarded more than the strict and literal sense of the words." The Court emphasized the duty of ascertaining the true intention of the parties, and in *Patapsco Ins. Co. v. Biscoe*, 7 Gill & Johnson (Maryland), 293; 28 Am. Dec. 219, the Court said: "Such intention, when it violates or conflicts with the principles of law, ought to be respected and carried into effect, as

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well in a contract of this description as in all others which may be made in the various dealings and intercourse between man and man." "Policies of insurance are rarely subjected to any critical construction, and the intent is regarded rather than any grammatical accuracy of language:" *Bradley v. Nashville Ins. Co.*, 3 Louisiana Annual, 708; 48 Am. Dec. 465, deciding that "thence" and "from," used in reference to intermediate ports, cover the insured subject while at those ports. "In construing contracts of insurance, effect must be given to the intention of the parties, as in the construction of all other contracts:" *Ripley v. Aetna Ins. Co.*, 30 New York, 136; 86 Am. Dec. 362, deciding that an answer that "there is a watchman nights," in a factory, is a warranty, and is broken by his absence from twelve o'clock Saturday night to twelve o'clock Sunday night; citing the principal case. In *West v. Citizens' Ins. Co.*, 27 Ohio State, 1; 22 Am. Rep. 294, the Court said: "The policy should receive a reasonable interpretation. Its intent and substance should be ascertained from the language employed. Its stipulations should have full legal effect, to guard the insurer against fraud and imposture. As it is a contract of indemnity to the insured, it should be liberally construed in his favor, not only because this mode of construction is most conducive to trade and business, but because it is probably most consonant with the intentions of the parties. There is no more reason for a strict compliance with its terms than ordinary contracts. There is nothing in such a contract intrinsically more sacred or inviolable than a contract about any other subject." 25 Wend. 374. Exceptions in a contract should be strictly construed, and when there are two interpretations equally fair, that which gives the greater indemnity should prevail. May on Insurance, sect. 174." The case cited above from Wendell, *Turley v. North Am. Ins. Co.*, is very instructive. The policy required, in case of loss, a certificate of a "magistrate or notary public most contiguous to the place of the fire." The certificate furnished was that of a county judge, who resided three or four blocks north, and whose office was two or three blocks south of the place of the fire; an alderman lived directly across the street, and a notary public a block and a half distant. The certificate was held sufficient. The Court declined "to go into a nice calculation of distances, and settle the point upon the laws of mensuration. *De minimis*, &c., is sufficient answer to this objection. The spirit of the condition requires no such mathematical precision from the assured. Its object is completely secured by the proximity of the certifying magistrate." STORY, J., in *Palmer v. Warren Ins. Co.*, 1 Story (U. S. Circ. Ct.), 360, said: "Policies of insurance are generally drawn up in loose and inartificial language, and indeed in the language of common life, and therefore are always construed liberally, and rarely, if it is possible, subjected to any nice or narrow or critical strictness, or any technical interpretation." But he admits the doctrine that exceptions "are to be construed most strongly against the party for whose benefit they have been introduced," citing *Blackett v. Royal Ex. Ins. Co.*, 2 Cr. & J. 244. In *Straus v. Imperial F. Ins. Co.*, 94 Missouri, 182; 4 Am. St. Rep. 368, the exception "notorious resistance to lawful authority" was construed to mean such an unusual and extraordinary state of affairs as that the usually constituted civil authorities were overpowered and tem-

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porarily unable and inadequate successfully to contend therewith, and not to apply to a mere rising of a few convicts in a State prison. "A contract of insurance differs in no respect from other contracts as to the rules for their interpretation :" *Renshaw v. Missouri S. M. F. & M. Ins. Co.*, 103 Missouri, 595; 23 Am. St. Rep. 904, holding that an unqualified insurance against loss or damage by fire covers injury by explosion caused by fire. The principal case is cited and approved in *Home Ins. Co. v. Gwathmey*, 82 Virginia, 923, where the holding was that where a policy issued to a warehouseman on his interest in goods on storage provided that such goods should be separately insured, and they were so separately insured by the owners in a different company, the latter company could not enforce contribution against the former.

But it is said, in *Co-operative L. Ass'n v. Leflore*, 53 Mississippi, 15 : "It is impossible to resist the conclusion, in perusing the cases, that the Courts, in order to avoid supposed hardships in this class of suits, have been disposed to adopt other rules than those applicable to ordinary contracts. For this difference we can recognize no sound principles. Contracts of insurance are neither *mala prohibita* nor *mala in se*, and when entered into by persons *sui juris*, are to be regulated and determined by the same rules that govern ordinary agreements, with neither more nor less favor than is shown in ordinary cases."

There is unquestionably a tendency in American jurisprudence to construe the policy liberally in favor of the assured. Cases enunciating this general doctrine are extremely numerous. It will be found, for example, in the recent case of *Schuermann v. Dwelling House Ins. Co.*, 161 Illinois, 437; 52 Am. St. Rep. 377, coupled with the statement, however, that "construction will not make a new contract for the parties or disregard the evidence as expressed." This favoring of the assured is also found in the very recent cases of *Georgia, &c. Ins. Co. v. Bartlett*, 91 Virginia, 305; 50 Am. St. Rep. 832; *Duran v. Standard, &c. Ins. Co.*, 63 Vermont, 437; 25 Am. St. Rep. 773; *American Accident Co. v. Reigart*, 94 Kentucky, 547; 42 Am. St. Rep. 374; *Moody v. Ins. Co.*, 52 Ohio State, 12; 49 Am. St. Rep. 699; *Harden v. Milwaukee M. Ins. Co.*, 164 Massachusetts, 382; 49 Am. St. Rep. 467. This liberality however is limited to cases of ambiguity as to the meaning of terms; if the contract is susceptible of two constructions, that will be adopted which is the more favorable to the assured; but if the language is clear and unambiguous, its effect cannot be destroyed by construction. *Travelers' Ins. Co. v. Dunlap*, 160 Illinois, 642; 52 Am. St. Rep. 355; *German Ins. Co. v. Hayden*, 21 Colorado, 127; 52 Am. St. Rep. 206; *Weidert v. State Ins. Co.*, 19 Oregon, 261; 20 Am. St. Rep. 809. These cases concern the construction of such phrases as "vacant," "vacant and unoccupied," "taking poison," "good" (as to title), "external and visible injury," "forthwith," &c. See also *Darrow v. Family Fund Soc.*, 116 New York, 537; 6 Lawyers' Rep. Annotated, 495 (suicide not a "violation of criminal law"); *Kratzenstein v. West. Assur. Co.*, 116 New York, 54; 5 Lawyers' Rep. Annotated, 799; *Burkheiser v. Mut. Acc. Assoc.*, 18 U. S. Appeals, 704; 26 Lawyers' Rep. Annotated, 112; May on Insurance, sects. 174, 175, 176.

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But in the American adjudications there is discoverable a disposition to accord a remarkable degree of elasticity to some apparently very rigid phrases in fire policies, a less degree of strictness being required in the construction of this description of policy than in marine policies. *Jolly's Adm'rs v. Baltimore Eq. Soc.*, 1 Harris & Gill (Maryland), 295; 18 Am. Dec. 288.

Several examples of construction may usefully be given here in illustration of the different tendencies of the Courts in the effectuation of the policy. One is of the phrase "contained in," as commonly used in fire policies. A policy insured furniture, sewing-machine, provisions, and family wearing apparel, "all contained in" a certain house. The insured sustained damage to his personal apparel, part of the insured apparel, while wearing it away from the premises mentioned. *Held*, covered by the policy. *Longuerille v. West. Assur. Co.*, 51 Iowa, 553; 33 Am. Rep. 146. It was similarly held of "mules contained in," &c., in *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minnesota, 229. In *London & L. F. Ins. Co. v. Graves*, — Kentucky, —, the same was held of two buggies temporarily removed from the stable for repairs. The Court said: "An examination of the various cases referred to by counsel leads us to the conclusion that the words 'contained in' must be construed with reference to the nature of the property to which they are applied. In insurances of personal property which is generally kept in one place, and whose use does not require it to be moved, such as a stock of merchandise in a store, or carriages in a wareroom for sale, the location is an essential element of the risk, and is generally a continuing warranty; but in insurance on property whose ordinary use requires it to be moved from place to place, the presumption is that they are in use, and that the policy is issued in reference to such use. In the first class of cases the words describing the situation are regarded as a warranty, not only that the property is situated as described, but that it will so continue. In the latter class the words defining the situation are words of description and of warranty only so far that the property will continue to be in the place of deposit, except when absent for temporary purposes incident to its ordinary use and enjoyment." So in *Everett v. Continental Ins. Co.*, 21 Minnesota, 76, the policy was on a threshing-machine, "stored in barn," and it was destroyed while in a field where it had been used, and it was held to be covered. So of a sealskin garment insured as "contained in" a dwelling-house, and burned while at a furrier's shop for repair. *Noyes v. N. W. Nat. Ins. Co.*, 61 Wisconsin, 415; 54 Am. Rep. 631. To the same effect, *Niagara F. Ins. Co. v. Elliott*, 85 Virginia, 932; 17 Am. St. Rep. 115, a case of vehicles insured as contained in a stable, but temporarily out at repair. So of live-stock described as being in a certain barn, and temporarily removed: *DeGraff v. Queen Ins. Co.*, 38 Minnesota, 501; 8 Am. St. Rep. 685, the Court laying down the rules that "any reasonable doubt as to meaning must be resolved in favor of the insured," and the language "must be construed with reference to the nature of the policy to which it is applied."

On the other hand, in the case of cars and engines "contained in" a car-house and an engine-house, it was held that they were not covered while

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running on the railway. *Annapolis, &c. R. Co. v. Pres't, &c. of B. F. Ins. Co.*, 32 Maryland, 37; 3 Am. Rep. 112. And in case of vehicles "contained in" a certain building, it was held in *Bradbury v. Fire Ins. Ass'n of England*, 80 Maine, 396; 6 Am. St. Rep. 219, that they were not covered when at a shop for repairs. So it was held of a horse described as "contained in" a barn, but killed by lightning while in a field at pasture. *Haws v. St. Paul, &c. Ins. Co.*, 130 Penn. St. 113; 2 Lawyers' Rep. Annotated, 52 (one Judge dissenting). In case of insurance on a harvesting-machine "operating in the grain fields and in transit from place to place in connection with harvesting," it was held not covered while at a blacksmith's shop for repair. *Mawhinny v. Southern Ins. Co.*, 98 California, 184; 20 Lawyers' Rep. Annotated, 87. In *Benton v. Farmer's M. F. Ins. Co.*, 102 Michigan, 281; 26 Lawyers' Rep. Annotated, 237, it was held that insurance on the "contents" of a building did not cover articles after removal and storage elsewhere. To the same purport, *English v. Frankin Fire Ins. Co.*, 55 Michigan, 273; 54 Am. Rep. 377; *Farmers' M. F. Ass'n v. Kryder*, 5 Indiana Appeals, 430; 51 Am. St. Rep. 285. But precisely the contrary was held of "contents," in a case of insurance on smoked meats in a smoke-house, and removed to a storage house as fast as smoked. *Graybill v. Penn., &c. Ass'n.*, 170 Penn. St. 75; 29 Lawyers' Rep. Annotated, 55; 50 Am. St. Rep. 747.

The word "loss" or "fire," in connection with a limitation of the time for suing, has given rise to extreme laxity of construction in the endeavor to effectuate the contract as against a technical and unmeritorious defence. Thus in *Hay v. Star F. Ins. Co.*, 77 New York, 235; 33 Am. Rep. 607, where the policy provided that "no action for the recovery of any claim by virtue of this policy shall be sustainable unless commenced within twelve months next after the loss shall occur," and it was held that this meant not the time when the property was actually destroyed, but when the loss became due and payable. The contrary construction, said the Court, "would in all cases restrict the time fixed for an indefinite period, and in some cases deprive a party of a right to bring an action at all, which is absurd, and an absurd result should never be reached by construction" (one Judge dissented). This doctrine is reiterated in *Steen v. Niagara F. Ins. Co.*, 89 New York, 315; 42 Am. Rep. 297, and is found in *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minnesota, 85; 18 Am. Rep. 385; *Killips v. Putnam F. Ins. Co.*, 28 Wisconsin, 472; 9 Am. Rep. 506 (*obiter*); *Spare v. Home M. Ins. Co.*, 17 Federal Reporter, 568; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *German Ins. Co. v. Fairbank*, 32 Nebraska, 750; 39 Am. St. Rep. 459; *Murdock v. Franklin Ins. Co.*, 33 West Virginia, 107; 7 Lawyers' Rep. Annotated, 572; *Case v. Ins. Co.*, 83 California, 473.

On the other hand, many Courts construe this phrase as meaning the day of the fire. *Chambers v. Atlas Ins. Co.*, 51 Connecticut, 17; 50 Am. Rep. 1; *Johnson v. Humboldt Ins. Co.*, 91 Illinois, 92; 33 Am. Rep. 47 ("occur" does not mean "accrue"); *Merchants' Mut. Ins. Co. v. Lacroix*, 35 Texas, 249; 14 Am. Rep. 370 ("date of loss"); *Fullam v. N. Y. U. Ins. Co.*, 7 Gray (Mass.), 61; 66 Am. Dec. 462; *State Ins. Co. v. Meesman*, 2 Washington, 459; 26 Am. St. Rep. 870 ("fire shall have occurred"); *Hart v. Citizens' Ins. Co.*, 86 Wis-

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consin, 77; 39 Am. St. Rep. 877; 21 Lawyers' Rep. Annotated, 743; *Glass v. Walker*, 66 Missouri, 32; *Virginia F. & M. Ins. Co. v. Wells*, 83 Virginia, 736; *Peoria S. R. Co. v. Canada F. & M. Ins. Co.*, 12 Ontario Appeals, 418; *Traveler's Ins. Co. v. California Ins. Co.*, 1 North Dakota, 151; 8 Lawyers' Rep. Annotated, 769; *Schroeder v. Keystone Ins. Co.*, 2 Philadelphia (Penn.) 286. In the *Hart* case, cited above, the Court observed: "It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight." See also *McFarland v. Railway &c. Assoc.*, — Wyoming, —; 27 Lawyers' Rep. Annotated, 48 ("the date of the happening of the alleged injury").

The United States Supreme Court was equally divided in opinion on the question in *Steel v. Phoenix Ins. Co.* (not officially reported), affirming the decision in 51 Federal Reporter, 715, which laid down the New York doctrine (one Judge dissenting).

A similar and very noteworthy exercise of the office of construction is observable in the American decisions respecting the word "suicide," and seemingly equivalent phrases, such as "die by his own hands," and "take his own life," in life policies. This subject is accorded an independent chapter in May on Insurance. This excellent writer says (sect. 307): "The Courts seem to delight in its discussion. There seems to be about this question a fascination which the judicial mind is unable to resist; and whenever the question presents itself, whether in the Courts of Westminster Hall, or those of our western wilderness, it has given rise to so many and such interesting opinions as to have secured for the student, if not relief from his perplexing doubts, at all events recreation and instruction while he is devoting himself diligently to inquiries which he hopes may result in such relief."

There is probably no difference of opinion in regard to an accidental and unintentional death by one's own hand, such a death not being regarded as within the phrases in question. So of taking poison by mistake or an over-draught of medicine. *Pollock v. U. S. M. A. Assoc.*, 102 Penn. State, 231; 48 Am. Rep. 204; *Keels v. Mut. Res. F. Assoc.*, 29 Federal Reporter, 198; *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Indiana, 212; 55 Am. Rep. 192; *Equit. L. Assur. Soc. v. Paterson*, 41 Georgia, 338; 5 Am. Rep. 535; *Penfold v. Universal L. Ins. Co.*, 85 New York, 317; 39 Am. Rep. 660. (But in the *Pollock Case, supra*, where death "by the taking of poison" was excepted, an involuntary taking by mistake was held to come within the exception: *Contra: Travelers' Ins. Co. v. Dunlap*, 160 Illinois, 642; 5 Am. St. Rep. 355.) See also *Paul v. Travelers' Ins. Co.*, 112 New York, 472; 3 Lawyers' Rep. Annotated, 443; 8 Am. St. Rep. 758.

But as to self-killing by an insane person there has been considerable difference of opinion. Some Courts have held if the insured knew the nature and consequences of the act, he is responsible therefor. *Mut. Ben. L. Ins. Co. v. Davies' Exr.*, 87 Kentucky, 541 (in *St. Louis M. L. Ins. Co. v. Gares*, 6 Bush, 268, the same Court was equally divided on the point); *Cooper v. Mass. M. L. Ins. Co.*, 102 Massachusetts, 227; 3 Am. Rep. 451; *Gay v. Union M. L. Ins. Co.*, 9 Blatchford (U. S. Circ. Ct.), 142; *Dean v. Am. L.*

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*Ins. Co.*, 4 Allen (Mass.), 96, the most exhaustive treatment on this side of the discussion.

Other Courts have held that if his reasoning faculties are so far impaired that he cannot understand the moral character, and the nature, character, and effect of the act, or if he is impelled by an insane impulse which he has no ability to resist, he is not responsible. *Life Ins. Co. v. Terry*, 15 Wallace (U. S. Sup. Ct.), 580; *Manhattan L. Ins. Co. v. Broughton*, 109 United States, 121; *Accident Ins. Co. v. Crandall*, 120 ibid. 531; *Connecticut M. L. Ins. Co. v. Akens*, 150 United States, 468; *Breasted v. Farmers' Loan & T. Co.*, 4 Hill (New York), 73; 59 Am. Dec. 482; 8 New York, 299 (three Judges dissenting); *Van Zandt v. Ins. Co.*, 55 New York, 169; 14 Am. Rep. 215; *Eastabrook v. Union M. L. Ins. Co.*, 54 Maine, 224; 89 Am. Dec. 743 (one Judge dissenting); *Phadenhauer v. Germania L. Ins. Co.*, 7 Heiskell (Tennessee), 567; 19 Am. Rep. 623; *Phillips v. Louis. Eq. L. Ins. Co.*, 26 Louisiana Annual, 404; 21 Am. Rep. 549; *Connecticut Mut. L. Ins. Co. v. Groom*, 83 Penn. State, 92; 27 Am. Rep. 689; *Schultz v. Ins. Co.*, 40 Ohio State, 217; 43 Am. Rep. 676: "In this country the conflict between the authorities is utterly irreconcilable. The decided preponderance however favors the general rule and rejects the English doctrine" of *Borradaile v. Hunter*, 5 M & G. 639; *Merritt v. Cotton States L. Ins. Co.*, 55 Georgia 103; *John Hancock M. L. Ins. Co. v. Moore*, 34 Michigan, 41; *Scheffer v. Nat. L. Ins. Co.*, 25 Minnesota, 534; *Hathaway's Adm'r. v. Nat. L. Ins. Co.*, 48 Vermont, 335; *Knickerbocker L. Ins. Co. v. Peters*, 42 Maryland, 414; *Blackstone v. Standard, &c. Ins. Co.*, 74 Michigan, 592; 3 Lawyers' Rep. Annotated, 486; *Mut. L. Ins. Co. v. Walden*, 00 Texas, 000; 26 S. W. Rep. 1012.

It has been held however in *Van Zandt v. Mut. Ben. L. Ins. Co.*, 55 New York, 169; 14 Am. Rep. 215, that the assured died "by his own hand," if he voluntarily and intentionally took his own life, although deprived by mental disease of the capacity to appreciate the moral quality of the act. Distinguishing and criticising *Breasted v. Farmers' L. & T. Co.* and *Mut. L. Ins. Co. v. Terry*, *supra*, and pointing out that they do not overrule *Borradaile v. Hunter*. See also *Adkins v. Columbia L. Ins. Co.*, 70 Missouri, 27; 35 Am. Rep. 410. These cases in effect hold that nothing short of an irresistible insane impulse will take the act out of the category of voluntary acts.

On this question reference may usefully be made to a note, 59 Am. Dec. 487.

One of the most interesting examples of liberal construction is to be found in *Sheanon v. Pacific Mut. L. Ins. Co.*, 77 Wisconsin, 618; 9 Lawyers' Rep. Annotated, 685; 20 Am. St. Rep. 151, where it is held that there is a "loss of two entire feet" when the person is deprived by paralysis of the use of his feet by means of an accidental pistol wound in his back, notwithstanding they are not amputated. So "total and permanent loss of the sight of both eyes" is suffered by the loss of the sight of the only eye the insured had, when this was known to the insurer. *Humphreys v. Nat. Ben. Assoc.*, 139 Penn. St. 264; 11 Lawyers' Rep. Annotated, 564. But there is not a "loss of a foot," where the foot is not even injured, and can be used when the person wears a plaster jacket to prevent an injury in another part of his body from

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affecting the use of his foot. *Stever v. Peoples' M. Acc. Ins., Assoc.* 150 Penn. State, 132; 16 Lawyers' Rep. Annotated, 446. Whether loss of three fingers is an "entire loss of hand" is a question of fact. *Lord v. Am., &c. Ac. Ass'n*, 89 Wisconsin, 19; 46 Am. St. Rep. 815.

But the Court was not imaginative enough to construe a person who habitually slept in a mill at night to be a "watchman." *Brooks v. Standard F. Ins. Co.*, 11 Missouri Appeals, 349.

In one of the most scholarly and interesting opinions in the American reports, the Court of Appeals of New York held that damage by lightning, not attended by ignition or combustion, was not damage by "fire." *Babcock v. Mont. Co. M. Ins. Co.*, 4 New York, 326. So held also in *Kenniston v. Mer. M. Ins. Co.*, 14 New Hampshire, 341; 40 Am. Dec. 193. The Court quoted from Job, Seneca, Milton, Spenser, Pope, and Byron. But damage by water used in extinguishing fire is damage by "fire." *Wetherell v. Marine Ins. Co.*, 49 Maine, 200; *Hillier v. Allegheny Co. M. Ins. Co.*, 3 Penn. State, 470; 45 Am. Dec. 656; *Thompson v. Montreal Ins. Co.*, 6 Upper Canada Q. B. 319. So of destruction by explosion of gunpowder by order of public authorities to arrest a conflagration. *City F. Ins. Co. v. Corties*, 21 Wendell (N. Y.), 367; 34 Am. Dec. 258.

The cases involving the construction of the words "vacant" and "unoccupied" are legion, and generally this question is regarded as one of fact. To illustrate the liberality of the Courts, we may refer to *Whitney v. Black River Ins. Co.*, 72 New York, 117; 28 Am. Rep. 116, where it was held that a saw-mill was not "vacant and unoccupied" when the use of the mill was temporarily discontinued on account of low water, lack of custom, or derangement of machinery. The Court cite a church, a schoolhouse, and a cider-mill as analogous instances. But a house must be used for lodging as well as for eating, and a barn for something more than storing hay and tools. *Ashworth v. Builders' M. F. Ins. Co.*, 112 Massachusetts, 422. A policy on a manufacturing, conditional to be void if the premises remain unoccupied for thirty days, or "cease to be operated," is not avoided by a cessation for eleven days on account of yellow fever. *Poss v. Western Assur. Co.*, 7 Lea (Tennessee), 704; 10 Am. Rep. 68. In *Kimball v. Monarch Ins. Co.*, 70 Iowa, 514, a hog-house was insured, on condition that the policy should be void if the premises "became vacated by the removal of the owner or occupant." It was held that this did not embrace the case of the absence of the hogs and the disuse of the building for the purpose of sheltering them, but was limited strictly to the case of an absence of the human beings in care of the premises and their contents.

As an illustration of the dealing of the Courts with the phrases "storing" and "keeping," reference is made to *Williams v. Firemen's F. Ins. Co.*, 54 New York, 569; 13 Am. Rep. 620. The policy prohibited storing or keeping of petroleum. The assured had been a soldier in the late Civil War, and by reason of a gunshot wound had contracted a cutaneous disorder, which he treated by applying petroleum. For this purpose he kept a few quarts on the premises. Held, not a "storing or keeping." The Court rather jocularly observed that it was no more such storing or keeping than if he had

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saturated his shirt and drawers with it, or "taken a quantity internally, for a like purpose." The present writer observed on this case, in 10 Albany Law Journal, p. 37: "Any other decision would have been an ungenerous requital for the sufferings of the plaintiff in the cause of his country, and would operate to retard enlistments in the event of another unholy rebellion. Let it once be adjudged that a man must not only bleed but itch for his country, unallayed by emollients of an inflammable nature, or run the risk of having his property destroyed by fire without the power of enforcing his insurance, and our liberties are no longer secure." In like manner benzine or petroleum may be kept on the premises for cleansing machinery: *Mears v. Humboldt Ins. Co.*, 92 Penn. State, 15; 37 Am. Rep. 647; or kept for lubricating machinery: *Carlin v. Western Assur. Co.*, 57 Maryland, 515; 40 Am. Rep. 440.

The phrase "external, violent, and accidental means," in accident policies, has been liberally interpreted to cover rupture of a blood-vessel by fright: *McGlinchey v. Fidelity Ins. Co.*, 80 Maine, 251; 6 Am. St. Rep. 190 (citing *Frew v. Assurance Co.*, 6 H. & N. 845); inhaling illuminating gas: *Paul v. Travelers' Ins. Co.*, 112 New York, 472; 8 Am. St. Rep. 758; 3 Lawyers' Rep. Annotated, 443; drinking poison: *Healey v. Mut. Acc. Ass'n*, 13 Illinois, 556; 23 Am. St. Rep. 637; 9 Lawyers' Rep. Annotated, 371 (citing the *Frew* case); inhaling carbonic acid in a well: *Pickett v. Pac. M., &c. Ins. Co.*, 144 Penn. State, 79; 27 Am. St. Rep. 618; 13 Lawyers' Rep. Annotated, 661; meat lodging in the windpipe: *Am. Ac. Co. v. Reigart*, 94 Kentucky, 547; 42 Am. St. Rep. 374; 21 Lawyers' Rep. Annotated, 651; death by freezing: *Northwest C. T. Ass'n v. London G. & A. Co.*, 10 Manitoba, 537. In the case of death from a malignant pustule occasioned by the bite of an insect, the Supreme Court of New York held it within the phrase in question; but this was reversed on appeal, and it was held a "disease" (two Judges dissenting): *Bacon v. U. S. Mut. Ac. Ass'n*, 123 New York, 304; 20 Am. St. Rep. 748; and so in *Stedman v. U. S. M. Ac. Ass'n*, 123 New York, 307; 9 Lawyers' Rep. Annotated, 617; and so of sunstroke: *Dozier v. Fidelity, &c. C. Co.*, 46 Federal Reporter, 446; 13 Lawyers' Rep. Annotated, 114; and so of loss of sight as the result of carrying weights while feeble: *Cobb v. Preferred M. Ac. Ass'n*, 96 Georgia, 818. But a blow of a pitchfork in the bowels, producing inflammation, is an accident and not a disease. *North Am. L. & A. Ins. Co. v. Burroughs*, 69 Penn. State, 43; 8 Am. Rep. 212.

The word "accident" is held to comprehend intentional injuries inflicted by a third person, as hanging by a mob: *Fidelity & C. Co. v. Johnson*, 72 Mississippi, 333; 30 Lawyers' Rep. Annotated, 206; and to the same effect, *Supreme Council, &c. v. Garrigus*, 104 Indiana, 133; 54 Am. Rep. 298; *Ins. Co. v. Bennett*, 90 Tennessee, 256; *Richards v. Travelers' Ins. Co.*, 89 California, 170; *Robinson v. U. S. M. A. Ass'n*, 68 Federal Reporter, 825; *Lorelace v. Travelers' P. Ass'n*, 126 Missouri, 104; 30 Lawyers' Rep. Annotated, 209; *Hutchcraft's Ex'r. v. Travelers' Ins. Co.*, 87 Kentucky, 300.

A very great geographical stretch of construction was indulged in *Miller v. Ins. Co.*, 12 West Virginia, 116; 29 Am. Rep. 452, where Cypress bayou, a navigable water emptying into Red River, which empties into the Mississippi, was held a "tributary" of the Mississippi.

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A condition against "sale" was construed in *Hoffman v. Aetna F. Ins. Co.*, 32 New York, 405; 88 Am. Dec. 337, not to cover a sale by one of the owners, copartners, to the other; and in *Insurance Co. v. Gordon*, 68 Texas, 144, not to cover a deed for the purpose of enabling the grantor to effect a loan, but which was not effected, and was not intended by either party to confer title. In *Hathaway v. State Ins. Co.*, 64 Iowa, 229; 52 Am. Rep. 438, a sale by one partner to another is held a "change of title" avoiding the policy; and so it was held in *Keeler v. Niagara F. Ins. Co.*, 16 Wisconsin, 523; but the great weight of authority is to the contrary and in harmony with the New York doctrine. See note, 52 Am. Rep. 443.

In *Home Mut. Ins. Co. v. Roe*, 71 Wisconsin, 33, a policy covered a "planning-mill building and addition," and "machinery, including shafting, gear ing," &c., "therein." The engine-room, from which the entire motive power was furnished, was twenty-two feet distant from the mill building, and connected with a shaft for the transmission of power, and by a spout through which shavings were forced into the engine-room. A roadway passed between the buildings under the shaft and spout. There was no other "addition," and the engine-room was held to be covered by the policy. The Court did not conceive that it was a case of ambiguity. In *Keeney v. Home Ins. Co.*, 71 New York, 396; 27 Am. Rep. 60, the policy described the business carried on as the manufacture of bath-tubs. On adjoining premises the insured conduced a sawing and planing mill, and the shavings from the latter were carried by a tube to feed the boiler-furnace on the former. This was held not a carrying on of the sawing and planing business on the insured premises.

A building insured as a dwelling-house is not changed in character by subsequent use as a boarding-house. *Planters' Ins. Co. v. Sorrels*, 1 Baxter (Tennessee), 352; 25 Am. Rep. 780. A warranty of occupancy as a boarding-house is not broken by occupancy in part as a bar-room and billiard room. *Martin v. State Ins. Co.*, 44 New Jersey Law, 485; 43 Am. Rep. 397. A warranty of occupancy as a dwelling-house does not exclude the idea that the premises may be partly occupied as a stable. *Hannan v. Williamsburgh City F. Ins. Co.*, 81 Michigan, 556. There is no implied agreement that an occupied house shall remain occupied, and a policy on a house "occupied by a tenant for dwelling and store," and providing that it should become void "if any change be made as to tenants or occupancy," was held not to be avoided by its becoming vacant. *Somerset County M. Ins. Co. v. Usar*, 112 Penn. State, 80; 56 Am. Rep. 307.

Another example of modern relaxation in the construction of insurance policies in favor of the insured is found in the interpretation of provisions for warranties and of implied warranties. Thus, if the application and policy declare that the answers shall be deemed warranties, but the policy also declares that nothing but fraud or intentional misstatements shall avoid the policy or that the policy will be contested only in case of fraud, the answers will be deemed mere representations. This is the doctrine of *Fitch v. Am. Pop. L. Ins. Co.*, 59 New York, 557; 17 Am. Rep. 372; and substantially of *Price v. Phoenix M. L. Ins. Co.*, 17 Minnesota, 497; 10 Am. Rep.

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166; *Southern L. Ins. Co. v. Booker*, 9 Heiskell (Tennessee), 606; 24 Am. Rep. 344; *Campbell v. N. E. M. L. Ins. Co.*, 98 Massachusetts, 381; *Wilkinson v. Conn. M. L. Ins. Co.*, 30 Iowa, 119; 6 Am. Rep. 657; *National Bank v. Ins. Co.*, 95 United States, 673; *Moulor v. Am. L. Ins. Co.*, 111 ibid. 335. The doctrine of the last two cases is that in case of doubt “the Court should lean against that construction which imposes upon the assured the obligations of a warranty.” The following is from *Alabama G. L. Ins. Co. v. Johnston*, 80 Alabama, 471: “In construing contracts of insurance, there are some settled rules of construction bearing on this subject, which we may briefly formulate as follows:—

“(1) The Courts being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured, and strictly against the insurer.

“(2) It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction. The Court, in other words, will lean against that construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction.

“(3) Even though a warranty, in name or form, be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the assured, so often merely categorical, will be construed not to be a warranty of immaterial facts, stated in such answers, but rather a warranty of the assured’s honest belief in their truth,—or, in other words, that they were stated in good faith. The strong inclination of the Courts is thus to make these statements, or answers, binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties, expressed in unequivocal and unqualified language to the contrary.”

“Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance, and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy-holders, who, acting with all proper prudence, as remarked by Lord ST. LEONARDS, in the case of *Anderson v. Fitzgerald*, 4 H. L. C. 507 (s. c. 24 Eng. L. & Eq. 1), had been led to suppose that they had made a provision for their families by an insurance on their lives, when, in point of fact, the policy was not worth the paper on which it was written.’ The rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical conditions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate, a departure from the rigidity of our earlier jurisprudence on this subject of warranties. And such, as we have said, is the tendency of the more modern authorities.”

An interesting application of this doctrine is found in *Aurora Fire Ins. Co. v. Eddy*, 49 Illinois, 106. The insured agreed to keep a certain number of

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buckets on the premises, a flax-mill, always filled with water. The Court held that this did not mean that the buckets should be so kept filled with water in freezing weather, no fires being allowed on the premises.

On this subject may be found an amusing commentary in the index to May on Insurance, as follows: "Warranty—not favored—Courts lean to make statements representations, 162 (and they ought to lean a little harder than some of them do.)"

There is some conflict as to keeping a watchman. We have referred to *Ripley v. Etna F. Ins. Co.*, 30 New York, 136; 86 Am. Dec. 362, holding that the words "there is a watchman nights," imply that he is on the premises Saturday and Sunday nights all night. This is the doctrine also of *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Connecticut, 19. In Massachusetts the question was left to the jury whether a "good watch" included one on Sundays. *Parker v. Bridgeport Ins. Co.*, 10 Gray, 302. But in Massachusetts it is held that the watchman need not be present constantly, but only when persons of ordinary care and skill in the like business employ one. *Houghton v. Manuf. Ins. Co.*, 8 Metcalf, 122; *Crocker v. People's M. Ins. Co.*, 8 Cushing, 79. But he must be in the habit of keeping awake. Sleeping habitually in the mill does not constitute one a watchman. *Brooks v. Standard F. Ins. Co.*, 11 Missouri Appeals, 349. At all events a dog is not a "watchman," although he "had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached said building." *Trojan Mining Co. v. Firemen's Ins. Co.*, 67 California, 27. He might answer as to burglars, but he was not a "fire-dog."

A policy on drugs and medicines prohibited the keeping of "gunpowder, fireworks, saltpetre," &c. Held, that saltpetre could be kept as a drug. *Collins v. Farmville Ins. & B. Co.*, 79 North Carolina, 279; 28 Am. Rep. 322.

A city ordinance prohibited the repair or reconstruction of wooden buildings, within specified limits, which had been injured by fire to the extent of one-third of their value. An insured building was partly destroyed by fire, and the Common Council refused leave to repair it. Held, a "total loss." *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Texas, 103; 59 Am. Rep. 613.

Insanity is "sickness." *McCullough v. Expressmen's M. B. Ass'n*, 133 Penn. State, 142; 7 Lawyers' Rep. Annotated, 210, citing *Burton v. Eyden*, L. R. 8 Q. B. 295.

In *Broadwater v. Lion F. Ins. Co.*, 34 Minnesota, 465, the premises insured stood on lands of the United States, used as a fort, and were insured as "store," "officers' and soldiers' clubs," &c., "at Fort Maginnis, Meagher County, M. T.," consisting of a post-trader's premises, and this description was held to convey notice to the company that the insured did not own the land, and thus to avoid the effect of a provision that the policy should be void if the building stood "on ground not owned in fee simple by the assured."

The term "family" may cover a case where the insured and the beneficiary were respectively an old man and a young woman, not related to him, but who had lived many years in the same house in the *quasi* relation of father and daughter. *Carmichael v. Northwestern Ben. Ass'n*, 51 Michigan, 494: "an expression of great flexibility. It is applied in many ways. It may

No. 52.—*Robertson v. French.*—Notes.

mean the husband and wife, having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestic or social body. It is often used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers" (or "the family of Christ.") So on a question of occupancy, it may consist of two male servants and employees of the insured, staying in the house, taking their meals at an adjacent hotel, and working about the premises. *Poor v. Hudson Ins. Co.*, 2 Federal Reporter, 432. But the Court could not work itself up to the opinion that fireworks were "family groceries." *Georgia H. Ins. Co. v. Jacobs*, 56 Texas, 366.

Near-sightedness has been held not to be a "bodily infirmity." *Cotten v. Fidelity & C. Co.*, 41 Federal Reporter, 506.

In *Gerhauser v. North B. & M. Ins. Co.*, 7 Nevada, 178, it was held that a building was not misdescribed as "brick" where, on account of the settling of one of its brick walls, it had been found necessary to replace it temporarily with wood, and it was insured while in that condition. The Court said: "We think the description was inserted, not by way of warranty, but to identify the premises. If on the face of the writing there is room for construction or doubt, the benefit of the doubt must be given to the assured. It has been well said that such clauses in a policy should be so framed that he who runs can read; that as such contracts are often entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be so framed as to perplex Courts and lawyers, and so that no prudent man can enter into one without an attorney at his elbow to tell him what the true construction of the document is. And if a warranty, it has not been proven untrue. In common parlance, this was a 'brick building,' and we must give to the language that meaning which plain and unlettered men usually attach to it."

In respect to the phrase "other insurance," in clauses of forfeiture, there is a notable conflict of opinion. Some Courts hold that the condition is not broken by procuring other insurance in itself invalid for any reason, as for example, on account of other insurance, and other Courts hold the contrary. Holding former opinion, see *Jersey City F. Ins. Co. v. Nichol*, 35 New Jersey Equity, 291; 40 Am. Rep. 625; *Firemen's Ins. Co. v. Holt*, 35 Ohio State, 189; 35 Am. Rep. 601; *Thomas v. Builders' Ins. Co.*, 119 Massachusetts, 121; 20 Am. Rep. 317; *Lindley v. Union Ins. Co.*, 65 Maine, 368; 20 Am. Rep. 701; *Gee v. Cheshire Co. Ins. Co.*, 55 New Hampshire, 65; 20 Am. Rep. 171; *Sutherland v. Old D. Ins. Co.*, 31 Grattan (Virginia), 176; *Rising Sun Ins. Co. v. Slaughter*, 20 Indiana, 520; *Sweeting v. M. F. Ins. Co.*, 83 Maryland, 63; 32 Lawyer's Rep. Annotated, 570; *Stacey v. Franklin F. Ins. Co.*, 2 Watts & Sergeant (Penn.), 506; *Obermeyer v. Globe M. Ins. Co.*, 43 Missouri, 573; *Copeland v. Phoenix Ins. Co.*, 96 Alabama, 615; 38 Am. St. Rep. 134. Holding the latter view: *Landers v. Watertown F. Ins. Co.*, 86 New York, 414; 40 Am. Rep. 554; *Somerfield v. State Ins. Co.*, 8 Lea (Tennessee), 517; 41 Am. Rep. 662; *Funke v. Minnesota F. M. F. Ins. Ass'n*, 29 Minnesota, 347; 43 Am. Rep. 216; *Allen v. Merch. Ins. Co.*, 30 Louisiana Annual, 1386; 31 Am. Rep. 243;

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*Lackey v. Georgia H. Ins. Co.*, 42 Georgia, 456; *Carpenter v. Prov. W. Ins. Co.*, 16 Peters (U. S. Sup. Ct.), 495; *Jacobs v. Eq. Ins. Co.*, 19 Upper Canada Q. B. 250; *Stevenson v. Phœnix Ins. Co.*, 83 Kentucky, 7; 4 Am. St. Rep. 120; *Reed v. Equit. F. & M. F. Ins. Co.*, 17 Rhode Island, 785; 18 Lawyers' Rep. Annotated, 496.

Whether the death of the insured effects a "change of interest" is differently held. That it does, is the decision in *Sherwood v. Agricultural Ins. Co.*, 73 New York, 447; 29 Am. Rep. 180. The contrary in *Richardson's Adm'r v. German Ins. Co.*, 89 Kentucky, 571; 8 Lawyers' Rep. Annotated, 800. Such death does not work an "alienation." *Burbank v. Rockingham M. F. Ins. Co.*, 24 New Hampshire, 550; 57 Am. Dec. 300.

A very singular case of construction has arisen in actions on life and accident policies, which provide that the insurer shall be permitted "to examine the body" of the deceased insured, to ascertain the cause of death. It has been held that if the insurer has been afforded an opportunity to do this before the interment, he cannot insist on exhumation of the body for that purpose. *Grangers' Life Ins. Co. v. Brown*, 57 Mississippi, 308; 34 Am. Rep. 446; *Weidle v. U. S. M. Acc. Ass'n*, 153 New York, 116.

No. 53.—PELLY *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

(1757.)

RULE.

GENERAL terms describing the adventure insured are construed to include all such acts and events as are by usage or necessary consequence incidental to the adventure.

**Pelly v. Royal Exchange Assurance Company.**

Burr. 341-352.

*Insurance. — Ship and Furniture. — Loss by Fire on Shore.*

[341] At Canton an East India ship stayed to clean and refit, for which purpose all the sails and furniture were taken out of the ship and put into a warehouse built for them on a sand-bank in the river there, where they were accidentally burnt; this is a loss within the words and meaning of a policy insurance of the ship, on its body, tackle, apparel, &c., and other furniture, against perils of the sea, &c., and fire (expressly), to any ports and places beyond the Cape of Good Hope and back again to London.

This came before the Court, upon a case reserved on a trial at Guildhall, before Lord MANSFIELD, where a verdict was found for

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the plaintiff, subject to the opinion of the Court. It was an action of covenant upon a policy of insurance.

Case. The plaintiff being part-owner of the ship *Onslow*, an East India ship, then lying in the Thames, and bound on a voyage to China and back again to London, insured it at and from London, to any ports and places beyond the Cape of Good Hope, and back to London; free from average under ten per cent upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the said ship: beginning the adventure upon the said ship, &c., from and immediately following the date of the policy; and so to continue and endure until the said ship, with all her ordnance, tackle, apparel, &c., shall be arrived as above, and hath there moored at anchor twenty-four hours in good safety. And it shall be lawful for the said ship, in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, without prejudice to this assurance. The perils mentioned in the policy are the common perils; viz., of the seas, men-of-war, fire, enemies, pirates, &c., &c., and all other perils, losses, and misfortunes, &c. The premium was seven guineas per cent, with the usual abatement of two per cent in case of a loss.

The ship sailed, &c., arrived in the river Canton in China; where she was to stay, to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture were, by the captain's order, taken out of her, and put into a warehouse or storehouse called a bank-saul, built for that purpose on a sand-bank or small island, lying in the said river, near one of the banks, called Bank-Saul Island, about two hundred or two hundred and twenty yards in length, and forty or fifty yards in breadth; in order to be there repaired, kept dry, and preserved till the ship should be heeled, and cleaned and refitted. Some time after this, a fire accidentally broke out in the bank-saul belonging to a Swedish ship, and communicated itself to another bank-saul, and from thence to the bank-saul belonging to the *Onslow*, and consumed the same, with all the sails, yards, tackle, cables, rigging, apparel, and other furniture belonging to the *Onslow* which were therein.

\* It was stated that it was the universal and well-known usage, and has been so for a great number of years, for all European ships which go a China voyage, except Dutch

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ships (who for some years past are denied this privilege by the Chinese, and look upon such denial as a great loss), “when they arrive near this Bank-Saul Island in the river Canton, to unrig the ship, and to take out her sails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on shore, in a bank-saul built for that purpose on the said island (in the manner that had been done on the present occasion by the captain of the *Onslow*), in order to be there repaired, kept dry, and preserved until the ship should be heeled, cleaned, and refitted.” And the case further states that it appears that the so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers and insured, and all persons concerned in the safety of the ship.

The ship arrived from her said voyage, in the Thames, in September, 1755 (having been unrigged, and put in the best condition the nature of the place and circumstances of affairs would permit).

Question, Whether the insurers are liable to answer for this loss (so happening upon this bank-saul), within the intent and meaning of this policy?

Mr. Williams, for the plaintiff, after premising that this question arises upon the construction of a policy of insurance; that these policies of insurance are of ancient date, are beneficial, as they tend to divide the risk, and have been everywhere encouraged in trading countries, made these three divisions of his argument:—

1st. He undertook to prove that the plaintiff's demands are founded on strict justice.

2ndly. That they are agreeable to both the words and meaning of the policy, and supported by legal determination.

3rdly. He said he would mention the opinion of foreign lawyers upon the subject.

Indeed it has been objected “that this is not a loss at sea,” but “a loss at land.”

First, The policy is general: it is not confined to losses at sea.

[\*343] \*Secondly, This is not a loss at land: it is what happened upon a sand-bank in the river.

Then he proceeded to his three heads or divisions of his argument.

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1st. As to the justice of the plaintiff's case —

The insurers have professedly and explicitly insured the ship and all her rigging, furniture, &c., from fire, &c., from her going out to her return; and they must be taken to be apprised of the usage, and to have calculated their premium accordingly. And what has here been done is stated to have been done "for the benefit of the insurers, and of the ship, and of all persons concerned in the safety of it;" and also "to have been prudent."

If the body of the ship had been burnt in this interim, and these sails and furniture had been saved by being in this warehouse, the insurers would then have had the benefit of this salvage. Therefore they ought, in the contrary event, to be answerable for them when they were by these means burnt, and the ship not burnt. It was the captain's duty to perform the voyage in the usual and proper course. And this was so far from being a neglect or misbehaviour in the captain, that he is stated "to have acted prudently, and for the benefit of the insurers and of all concerned."

2ndly. This is within the words of the policy — 'T is an insurance "from London to any ports or places beyond the Cape of Good Hope, and back, and during the voyage;" and fire is expressly insured against.

And it is also within the meaning and intent of the policy. For this loss has happened within the usual course of the voyage, and of this species of trade; and therefore the insurers are liable. And this is the true distinction. To prove which he cited 2 Salk. 445, *Bond v. Gonzales*: "deviation or not, must be taken according to the necessity and usage." *Clayton v. Simmons*, 11th March, 1741, at Guildhall, per LEE, Ch. J. "If the master puts into a port not usual, or stays an unusual time, it is a deviation, and discharges the insurer; not, if he does as usual." *Tierney v. Etherington*, 5th March, 1743, per LEE, Ch. J., at Guildhall. The goods were unloaded and put into a store-ship at Gibraltar, and there lost. The question was, Whether this was a loss at land, or a loss in the voyage? He held "that policies ought to be construed largely, and for the benefit of the insured, and according to the course of trade and the methods usual at the place;"

\*and as that was the known course of trade at Gibraltar, [\*344] he held "the insurers to be responsible." And in Easter Term following (p. 1744, 17 Geo. II.) there was a motion for a new

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No. 53.—*Pelly v. Royal Exchange Assurance Co., Burr. 344.*

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trial, which was refused. Now that was not within the words of the policy, and yet holden to be within the meaning of it.

Where an insurance is for one entire voyage, the contract cannot be suspended, and revived again, if it be suspended at all, tis determined. And yet they will hardly argue that this contract was absolutely determined by this act that is stated.

3rdly. As to the opinions of foreign writers, they hold "that where the assurance is general, the insurer is liable to all loss happening in the usual course of the voyage."

And to this purpose he cited Loccenius, *de jure maritimo*, l. 2, c. 5, sect. 10, *de aversione periculi*. Whose distinctions turn upon the master's pursuing the usual course of the voyage, Marcarlus de Jure Mercator, l. 2, c. 15, No. 148; Roceus, *de Assecurationibus*, No. 138. The insurer is liable for all losses *durante itinere*.

So that the principles of justice and equity, the strictness of law, and the opinions of foreign writers, all concur in favour of the plaintiff.

Sir Richard Lloyd, for the defendants (the insurers), agreed to Mr. Williams's general principles, and that the insurers were liable for all losses during the course of the voyage. But he denied Mr. Williams's conclusions; and insisted that this policy was certainly confined to losses at sea, whereas this loss was a loss on shore. This is a policy upon the body of a ship, and therefore is manifestly confined to losses at sea only. Besides, these goods are averred, by the very declaration itself, "to have been carried on shore." And its being an insurance "out and home" does not interfere with this position. As to the supposition "that the ship had been burnt, and the sails, &c., saved," it is no argument at all: for if they had not been lost, the insurers could not certainly have been liable to pay for them. As to the prudence of the captain, it might be prudent with regard to the owners; but this care of them is not to affect the insurers. He is indeed to act his best for both; but *diverso intuitu*, and not to serve the one at the risk of the other. As to the words of the policy, he denied it to be within them; referring himself to the words themselves.

The cases cited do not affect the present case, and foreign writers have said no more than English ones. For, no doubt, the insurance must be understood to be in the usual course of trade, and *durante itinere*. But the question is, "What is the *iter* insured?"

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\* This is a common policy of insurance in the old and [\* 345] ordinary form; and it must be understood as these policies were understood before the East India Company had a being, and the intent of it must be collected from the instrument itself.

Now this is an insurance of the ship, with its tackle and furniture, &c., from port to port. And policies must be construed upon the words of them, or from necessary consequences. If anything beyond the natural import of the words was intended, it ought to have been specified; if not specified, it cannot be supposed.

The Court alone are to judge of the extent of the contract; and these contracts have been construed strictly. A deviation from the particular voyage insured shall discharge the insurer, unless a necessity intervenes; which does, and ought, to alter the case. But even that must be within the compass of the voyage described; for if it happens after a deviation, the insurer is discharged, even though the ship should have returned into the right road again before the accident happened. Now, this present accident did not happen within the voyage insured, for it happened at land.

But Mr. Williams says, "This happened in the course of trade." My answer is, "That we have nothing to do with the course of trade." We have nothing to do with anything but the course of navigation, which is quite a different thing. These sails, tack'e, &c., were insured in the ship; and if the captain takes them out of the ship and puts them anywhere else, the insurers are not answerab'e. And its being for the benefit of the ship, &c., makes no difference. It did not arise from necessity, much less from a necessity arising in the voyage. This act of mere prudence or convenience cannot affect the insurers. And their knowing this to be the course of the voyage will not prove that they meant to insure anything at land. They cannot, by their charter, do it, for that restrains them from insuring at land; and therefore they certainly never intended it. As to the case of *Tierney v. Etherington*, p. 17, Geo. II., it was not a common policy. It was thereby agreed "that they might unload, &c., and reship into an English ship." But no English ship being there, they unloaded upon a store-ship. And this was a peril at sea, for the ship was lost at sea; so that it strict'y and properly was within the voyage. And as to its being the mode of reshipping, in case no other ship was

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there, here is no such agreement in the present case, as was there inserted in the policy; so that it was within the very terms of the policy in that case. He cited the case of *Fitzgerald v. Pole*, in p. 23, Geo. II., in B. R., and afterwards in *dom. proc.* in May, 1752 [Willes, 641], which was an insurance of a privateer for four months; and there the whole cruise was by this Court under-[\* 346] stood \* to be insured; and the insurers were holden here to be bound, though the ship itself was safe; and accordingly they gave judgment for the plaintiff. But the House of Lords held them discharged, as the ship was safe, and affirmed the judgment of the Exchequer Chamber, who had reversed that of B. R. And there is no inconvenience in my doctrine, because whatever is by the parties particularly meant to be insured, beyond the general meaning of the words, may be specially inserted in the policy; and then all will be clear, and nothing left to uncertain construction.

Mr. Williams in reply:—

This fire happened during the course of the voyage. And this insurance is not merely upon the ship, but upon the rigging, sails, tackle, and furniture likewise; which in their nature are capable of being carried on shore, and usually are so, upon these occasions, as is expressly stated.

And this is a loss happening in port. It is the proper and the only port where the English can clean and refit their ships. And being upon a sand-bank in the river is a loss at sea, not at land. If the goods cannot be removed from on board one ship to another, the reason of that must be that the insurer has had only that particular ship in contemplation, on which he insured; and perhaps the care and caution of the master of it too, as well as the goodness of the ship.

This taking out and depositing the rigging, sails, and furniture was a necessary act; and is done by all the nations in Europe, except the Dutch, who are stated to consider it as a disadvantage that they are not permitted to do it. And it is stated to be for the benefit of the ship, and of the insurers, and all concerned. And this being the usual course of the voyage, it was unnecessary to particularize or specify this in the policy: it must necessarily have been in the contemplation of the insurers.

And as to the company's being obliged by their charter not to insure on land, the merchants insuring with them are not obliged

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to know this; nor do the company in fact practise it. Besides, if they do it, notwithstanding their charter, they are not the less bound to answer what they have undertaken. And, indeed, the charter only means to preclude them from insuring houses and buildings at land (which is quite another thing), not ships at land.

As to the case of *Fitzgerald v. Pole*, there was no loss of the thing insured; whereas here is a loss of the very thing insured.

\* Lord MANSFIELD said, it was very necessary that the [\*347] determinations upon policies of insurance should be fixed and certain; and therefore they would consider this matter, and look into the cases, and then (within the term) give their opinion.

*Cur. adv. vult.*

Lord MANSFIELD now delivered the opinion of the Court.

He stated the case minutely, and then the question, which was, “Whether this was a loss for which the insurers are responsible, within the intent and meaning of the above-mentioned policy of insurance.”

By the express words of the policy, the defendants have insured the tackle, apparel, and other furniture of the ship *Onslow*, from fire, during the whole time of her voyage, until her return in safety to London, without any restriction.

Her tackle, apparel, and furniture were inevitably burnt in China, during the voyage, before her return to London.

The event then which has happened is a loss within the general words of the policy; and it is incumbent upon the defendants to show, from the manner in which this misfortune happened, or from other circumstances, “that it ought to be construed a peril which they did not undertake to bear.”

From the nature, object, and utility of this kind of contract consequences have been drawn, and a system of construction established upon the ancient and inaccurate form of words in which the instrument is conceived.

The mercantile law in this respect is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

Hence, among many others, the following rules have been settled. If the chance is varied or the voyage altered by the fault of th-

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owner or master of the ship, the insurer ceases to be liable, because he is understood to engage that the thing shall be done, safe from fortuitous dangers, provided due means are used by the trader to attain that end.

[\*348] \* But the master is not in fault, if what he did was done in the usual course, or necessarily *ex justâ causa*.

The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen, and in contemplation, at the time he engaged. He took the risk, upon a supposition that what was usual or necessary would be done.

It is absurd to suppose, when the end is insured, that the usual means of attaining it are meant to be excluded.

Therefore, when goods are insured "till landed," without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore.

If it is usual to stay so long at a port, or to go out of the way, the insurer is considered as understanding that usage. *Bond v. Gonzales*; 2 Salk. 445, was so ruled by Ld. Ch. J. Holt.

If goods are insured on board one ship, to a port, and from thence on board another ship, the first that can be got, the insurance extends through all the intermediate steps of removing from one ship to the other, as usual. For the means must be taken to be insured, as well as the end.

All this has been determined in the case of *Tierney v. Etherington*, at Guildhall, 5th March, 1743. That was an insurance on goods in a Dutch ship from Malaga to Gibraltar, and at and from thence to England and Holland, both or either; on goods as hereunder agreed, beginning the adventure from the loading, and to continue till the ship and goods be arrived at England or Holland, and there safely landed.

The agreement was, "that upon the arrival of the ship at Gibraltar the goods might be unloaded, and reshipped in one or more British ship or ships, for England and Holland, and to return one per cent if discharged in England."

It appeared on evidence that when the ship came to Gibraltar the goods were unloaded, and put into a store-ship (which it was proved was always considered as a warehouse); and that there was

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then no British ship there. Two days after the goods were put into this store-ship, they were lost in a storm.

\* For the defendant, it was insisted, that the insurance [\*349] was only upon the Dutch and British ships, and that it did not extend to the store-ship; which is considered as a warehouse at land, and so not a peril at sea.

For the plaintiff, it was insisted, that this was a loss in the voyage; for the policy is, for all losses at Gibraltar, as well as to and from. If there had been a British ship there, and the goods had been put into a lighter, in order to go to the British ship, and lost in the way, that would have been a loss within the policy.

We have liberty to unload and reship; and therefore have a liberty to use all the means in order to do that.

LEE, Ch. J., said: It is certain, that, in construction of policies, the *strictum jus*, or *apex juris*, is not to be laid hold on, but they are to be construed largely for the benefit of trade and for the insured. Now it seems to be a strict construction to confine this insurance only to the unloading and reshipping, and the accidents attending that act. The construction should be according to the course of trade in this place. And this appears to be the usual method of unloading and reshipping in that place, viz., "that when there is no British ship there, then the goods are kept in store-ships."

He added, that where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, that is a compliance with the policy, if that be the usual place to which the ships come.

Therefore, as here is a liberty given of unloading and reshipping, it must be taken to be an insuring the goods under such methods as are proper for the unloading and reshipping. Here is no neglect on the part of the merchant (the insured), for the goods were brought into port the 19th, and were lost the 22nd, of November.

This manner of unloading and reshipping is to be considered as the necessary means of attaining that which was intended by the policy, and seems to be the same as if it had happened in the act of reshipping from one ship to the other. And as this is

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the known course of trade, it seems extraordinary if it was not intended.

This is not to be considered as a suspension of the policy, during the unloading and reshipping from one ship to another.

For, as the policy would extend to a loss happening [\*350] \* in the unloading and reshipping from one ship to another, so any means to attain that end come within the meaning of the policy.

And, accordingly, a verdict was given for the plaintiff.

In the Easter Term following, a new trial was moved for, but it was refused by Lord Ch. J. LEE, Mr. Justice CHAPPLE, and Mr. Justice DENISON; Mr. Justice WRIGHT indeed being of a different opinion, namely, "that it was a removal at the peril of the insured."

So, in the present case, the same reasoning will hold. And, in general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it was expressed.

The usage, being foreseen, is more strongly allowed to be done, than what is left to the master's discretion upon unforeseen events; yet if the master, *ex justâ causa*, goes out of the way (as to refit, or to avoid enemies, pirates, &c.), the insurance continues.

Upon these principles it is difficult to frame a question which can arise out of this case, as stated.

The only objection is, "that they were burnt in a bank-saul and not in the ship; upon land, and not at sea, or upon water; and, being appertinent the ship, losses and dangers ashore could not be included."

The answer is obvious. (1st) The words make no such distinction. (2ndly) The intent makes no such distinction.

Many accidents might happen at land, even to the ship.

Suppose a hurricane to drive it a mile on shore, or an earthquake may have a like effect; suppose the ship to be burnt in a dry dock; or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting, as on account of a hole in its bottom, or other mischance.

These are possible cases. But what might arise from an accidental occasion of refitting the ship is not near so strong as a certain necessary consequence of the ordinary voyage, which

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the parties could not but have in their direct and immediate contemplation.

Here, the defendants knew that this ship must be heeled, cleaned, and refitted in the river of Canton. They knew that \*the tackle, &c., would then be put in the bank- [\*[351] saul; they knew it was for the safety of the ship, and prudent that they should be put there.

Had it been an accidental necessity of refitting, the master might have excused taking them out of the ship *ex justâ causa*. But describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned.

Was the chance varied by the fault of the master? It is impossible to impute any fault in him.

Is this like a deviation? No; 'tis *ex justâ causa*, which always excuses.

And yet Sir Richard Lloyd, being pressed in his argument, was obliged to insist "that it resembled a deviation, which determines the insurance and discharges the insurer."

Answer. This supposes the parties to insure from London and back again, knowing that the policy would be determined in the river of Canton, which would be absurd. Besides, it ought to make a difference in the premium, yet the underwriters have all kept the premium upon other China voyages.

One objection was formed by comparing this case to that of changing the ship or bottom on board of which goods are insured, which the insured have no right to do.

Answer. There the identical ship is essential; for that is the thing insured. But that case is not like the present.

Another objection was, "that policies ought to be construed strictly, and not to be extended to cases omitted" (which latter position is true, and must be agreed).

Answer. But that is not the present case; for this is not a *casus omissus*; but clearly within the view and *bona fide* intent of the policy.

The case of *Fitzgerald v. Pole* is no way applicable to the present. The question there was, "whether it was a partial or a total loss, within the meaning of the policy." In that case there was nothing fixed by usage, or by known and established construction (as there is in this case); so that no inference can be drawn from that case, concluding to this.

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No. 53. — *Pelly v. Royal Exchange Assurance Co., Burr. 351, 352.* — Notes.

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Here the defendants knew that the tackle and furniture would be put in this bank-saul, as the usual, certain consequence [<sup>\*352]</sup> of the voyage at sea, which always made it necessary \* to heel, clean, and refit the ship in the river of Canton. Had the insurers been asked, they must, for their own sakes, have insisted they should be put there, as the best and safest method. They would have had reason to complain, if, from their not being put there, a misfortune had happened; in that case, the master would have been to blame, and, by his fault, would have varied the usual chance.

They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one.

Therefore we (all of us who heard the argument) are very clearly of opinion, that in every light and every view of this case, in reason and justice, and within the words, intent, and meaning of the policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss. Wherefore,

PER CUR.

*Let the postea be delivered to the plaintiff.*

#### ENGLISH NOTES.

The case of *Salvador v. Hopkins* (1765), 3 Burr. 1707, arose out of an insurance for a voyage in the East India trade "at and from Bengal to any ports in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forward and backwards, and during her stay at such place until her arrival in London." By the original charter-party it appeared that the voyage originally contemplated should terminate in February, 1764, but it was a known incident of such voyages that the East India Company, who had the control of the voyage, might detain her longer. After the arrival of the ship in Bengal the Company made a new agreement under which the ship would be detained in India for another year. Under this agreement she sailed back to Bombay and sailed again to Bengal, and on returning from Bengal the second time was lost. It was objected that the insurance was made after the advice of the new agreement was received, and that the insurers were not informed of it. It was held by the Court in a judgment delivered by Lord MANSFIELD that the usage of the trade for a ship to be detained beyond the time mentioned in the original charter-party was notorious, and that the insurers must be taken to have been cognisant of it, and that it was one of the incidents of the voyage that a ship might be

No. 53.—*Pelly v. Royal Exchange Assurance Co.*—Notes.

detained in the country trade; and that it would cause great confusion and litigation if the assured in such cases should be bound to open to the insurer all the grounds of his expectations about the time of the ship's coming home.

In *Noble v. Kennaway* (1780), 2 Doug. 510, a somewhat similar decision was given on an insurance in a fishing voyage on the coast of Labrador. The insurers complained that there had been unreasonable delay in unloading the cargo, and that this gave the opportunity for the ship to be taken by an American privateer. To show that the delay was not unreasonable, evidence was given of the usage of the fishing trade on this coast, and also of the usage on the coast of Newfoundland,—the latter evidence being admitted, although objected to. It was held that the underwriters were bound by the usage.

In *Gregory v. Christie* (1784), 3 Doug. 419, the insurance was “on goods, specie, and effects” at and from London to Madras and China, with liberty to touch, stay, and trade at any ports, &c., until the vessel shall arrive at her last loading port in the East Indies or China. It was held that by the usage of the East India trade this policy covered an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China; and also that, by the usage of trade, the words “goods, specie, and effects” cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges *respondentia* interest.

So in *Brough v. Whitmore* (1791), 4 T. R. 206, 1 R. R. 361, where the stores and provisions for the crew had been taken out of the ship for the purpose of refitting, and were destroyed by accidental fire while stored in a warehouse on the Canton River, it was held that the insured was entitled to recover under a policy of insurance of ship and furniture.

A strong case of usage importing an incident to the adventure is furnished by the case where a ship insured “at and from Oporto to London” was blown out to sea and lost while waiting outside the bar to complete her loading. It was proved that this was usual for vessels loading at Oporto; and the insured were held entitled to recover. *Kingston v. Knibbs* (1758), 1 Camp. 508 *n.*, 10 R. R. 742 *n.*

Where a policy was effected on living animals free from mortality and jettison, and in consequence of the agitation of the ship in a storm some of the animals were killed and others received such injuries that they died before the termination of the voyage:—it was held that this was a loss by peril of the sea; and the exception of “mortality” did not apply, since that word in its ordinary and popular sense was not applicable to the circumstances of the death. *Lawrence v. Aberdeen* (1821), 5 B. & Ald. 107, 24 R. R. 299.

In the case of *Gabay v. Lloyd* (1825), 3 B. & C. 793, 27 R. R. 486,

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No. 53.—*Pelly v. Royal Exchange Assurance Co.*—Notes.

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this decision was followed in a similar policy; and an alleged usage at Lloyd's (where the policy was effected), that on such a policy no loss was paid if the ship arrived safe, was rejected, it not being shown that the usage was general, or that the plaintiff had knowledge of it.

#### AMERICAN NOTES.

This case is cited in 1 Parsons on Marine Insurance, pp. 80, 477, 563, and in Lawson on Usages and Customs, pp. 116, 414, and in 1 Duer on Insurance, pp. 161, 211, 234; and in *Merchants' Ins. Co. v. Edward Davenport & Co.*, 17 Grattan (Virginia), 144; *Hoffman v. Ætna F. Ins. Co.*, 32 New York, 405; *Alabama G. L. Ins. Co. v. Johnston*, 80 Alabama, 467; 60 Am. Rep. 112.

Sustaining the rule: *Tesson v. Atlantic M. Ins. Co.*, 40 Missouri, 33; 93 Am. Dec. 293; *Daniels v. Hudson R. F. Ins. Co.*, 12 Cushing (Mass.), 416; 59 Am. Dec. 192; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Connecticut, 19; 54 Am. Dec. 309; *Whitney v. Ocean Ins. Co.*, 14 Louisiana, 485; 33 Am. Dec. 595 (custom not to employ pilot); *Grant v. Lexington F. L. & M. Ins. Co.*, 5 Indiana, 23; 61 Am. Dec. 74 (discharging hands); *Coit v. Commercial Ins. Co.*, 7 Johnson (N. Y.), 385; 5 Am. Dec. 282 (sarsaparilla not a "root"); *Astor v. Union Ins. Co.*, 7 Cowen (N. Y.), 202 (skins and hides not "fur"); *Allegre's Adm'r's v. Maryland Ins. Co.*, 2 Gill & Johnson (Maryland), 136; 20 Am. Dec. 424 (whether "cargo" covered live-stock).

In *Hall v. Ocean Ins. Co.*, 21 Pickering (Mass.), 472, it was left to the jury to decide, whether according to the custom of Boston, the loss of the small boat from the stern davits should be charged to the insurers; citing *Blackett v. Royal Ex. Ass. Co.*, 2 Cr. & J. 244. In *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108, it was held that although usually insurers are not liable for loss of goods carried on deck, yet they are liable if the goods are such as are usually carried on deck, and if it is customary for insurers to pay for them when thus carried and lost or damaged. The Court said: "The construction which has from time to time been given by Courts in judicial decisions, and the ordinances of commercial countries, and the known usages, touching this contract, have been introduced and considered as part of the law merchant of the civilized world; and we are not disposed to narrow the view.

"We agree to the cases cited by the counsel for the plaintiffs as to the usages of and course of trade, as to the place and mode of taking in and discharging the cargo, and the usages touching the manner of conducting the voyages. Take, for example, the well-known case of the loss of the sails and rigging of a ship which were burnt on the Bank Saul Island. *Pelly v. Royal Exchange Ass. Co.*, 1 Burr. 348. The defence was, that the sails and rigging were on the land when they were burnt. The satisfactory answer was, that they were properly placed there, according to the known usage, while the ship was cleaned, heeled, and refitted. Many other instances of usages may be found in the cases mentioned by Lord MANSFIELD in the case last cited, of which underwriters are bound to take notice. "We agree to the position which is stated for the plaintiffs, a *settled usage of trade* to which the policy

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No. 53.—*Pelly v. Royal Exchange Assurance Co.* — Notes.

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relates, not contrary to any principle of law, and not inconsistent with the object and terms of the policy, will be presumed to have been known by the underwriters, and taken into consideration when the contract was made, and will have the same effect as if such usage were inserted in the policy.” The same was held in respect of carrying honey on deck. *Orient Mut. Ins. Co. v. Reymershoffer*, 56 Texas, 234; *Allen v. St. Louis Ins. Co.*, 85 New York, 473; *Rogers v. Mech. Ins. Co.*, 1 Story (U. S. Circ. Ct.), 603.

Whether a delay is so unreasonable as to constitute a deviation “depends on the nature of the voyage and the usage of the trade.” *Columbian Ins. Co. v. Cutlett*, 12 Wheaton (U. S. Supr. Ct.), 388.

The principal case is cited in *Mobile M. D. & M. Ins. Co. v. McMillan*, 27 Alabama, 98, on a question of custom in respect to place of landing, and with it *Robertson v. French*, ante. The decision was that although the carrier would be bound to deliver the goods in question at the city of New Orleans, yet the liability on a marine policy would end at Lake Pontchartrain, that being by usage regarded as “the port of New Orleans.” The marine policy did not cover the subsequent terrane transportation. The Court said: “We rest our decision upon the *terms of the policy itself*, considered of course with reference to what is usually done by such a vessel, with such a cargo, in such a voyage, all of which must be considered as forming a part of the policy, as much so as if inserted in it. 1 Burr. 350; 3 Saund. 200 a, n. 1. Both the assurer and insured are chargeable with a knowledge of the course of this trade, and are presumed to contract with reference to it.” “It was certainly competent for the parties to contract for covering losses which should come to the goods upon their marine passage and until safely landed, leaving their overland passage unprotected by the policy. This we have held was the effect of the policy before us.”

The obligation to employ a pilot is dispensed with by custom. *Keeler v. Firemen's Ins. Co.*, 3 Hill (N. Y.), 250 (citing *Law v. Hollingsworth*, 7 T. R. 161); *Cox, Maitland, & Co. v. Charleston M. & F. Ins. Co.*, 3 Richardson Law (So. Car.), 331.

Although it may be usual for steamboats to tow vessels up and down a river, yet in the absence of usage for insurers to pay the expense thereof there is no liability to pay them. *Hermann v. West M. & F. Ins. Co.*, 13 Louisiana, 516.

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No. 54. — *Camden v. Cowley*, 1 W. Bl. 417, 418. — Rule.

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No. 54. — **CAMDEN v. COWLEY.**

(1762.)

RULE.

THE general opinion of merchants may be given as evidence of the custom or understanding of merchants to explain expressions in a policy which are inadequate to explain themselves. As thus explained, an insurance on ship “to Jamaica” is determined by the ship’s having been moored twenty-four hours in any port there, although she has outward-bound cargo for other ports.

**Camden v. Cowley.**

1 W. Bl. 417, 418.

*Insurance — Moored 24 Hours in Safety. — Usage.*

[417] Insurance on a ship to Jamaica determined (according to the general usage of merchants) by the ship’s mooring twenty-four hours in any port there, and does not continue till she comes to the last port of delivery.

Action on a policy of insurance on a ship at and from Jamaica to London. The ship was also insured from London to Jamaica generally; and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island.

In order to show when the homeward-bound risk commenced, it was necessary to show at what time the outward-bound risk determined; and to prove that, by the custom of merchants, the outward-bound risk determined, not when the ship arrived and moored twenty-four hours in any port of the island (as the plaintiff in the present cause contended), but when she had been safe twenty-four hours in her last port of delivery.

Lord MANSFIELD, Ch. J., ruled, that insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in the trade; though they knew no particular instance, in fact, upon which such opinion was founded.

The jury, being special, found a verdict for the plaintiff  
[\* 418] \* Motion for a new trial, the verdict being (as was suggested) contrary to the sense and meaning of the parties

No. 54.—*Camden v. Cowley*, 1 W. Bl. 418.—Notes.

But Lord MANSFIELD, Ch. J., stated to the Court that the ship in question was what is called a general ship; namely, advertised at Lloyd's coffee-house as bound to the island generally, and by the course of trade to touch at the several ports of the island, there to deliver some goods, and take in others; that it was insured at and from Jamaica, and warranted to depart with convoy. The policy was very inaccurately worded, in not defining what was meant by being at Jamaica; and I left it to the jury, which was a very capable one.

The inclination of my opinion was the contrary way; but I think it was thoroughly tried, and that no new light can be now thrown in. And, therefore, I am against granting a new trial; which, if the verdict should be contradictory, must in the end produce a third.

DENNISON, J., *accord.*

WILMOT, J., *accord.*—I think the verdict a right one. The ship arrived at Jamaica, the first port she came to trade in.

*Rule denied.*

## ENGLISH NOTES.

The last ruling case, No. 53, p. 30, *ante*, and most of the cases cited in the notes to it, may also be referred to on the question of importing usage into the construction of a policy.

On the other hand, evidence of usage cannot be permitted to contradict the plain words of a policy. So where a policy of insurance was made on ship, “her tackle, apparel, ordnance, munition, boat; and other furniture,” evidence was held inadmissible of a usage that the underwriters never pay for the loss of boats slung upon the outside of the ship; it being proved that the boat in question was slung in the proper and usual manner on the quarter. *Blackett v. Royal Exchange Assurance Co.* (1832), 2 Cr. & Jer. 244, No. 65, *post*.

## AMERICAN NOTES.

The case is cited in 2 Parsons on Marine Insurance, pp. 52, 58, and Lawson on Usages and Customs, p. 257. The doctrine is found in cases cited in the last notes, for example, in the “fur” and “roots” cases, and as to “a coppered ship,” in *Hazard's Adm'r. v. N. E. M. Ins. Co.*, 8 Peters (U. S. Sup. Ct.), 557. The principal case is cited by MARSHALL, Ch. J., in *Dickey v. Baltimore Ins. Co.*, 7 Cranch (U. S. Supr. Ct.), 329, although the question of custom did not there arise. In *Rankin v. Am. Ins. Co.*, 1 Hall (N. Y. Super. Ct.), 619, the Court said: “The rule as to the admission of usage, to control the construction of a policy, seems to be, that it may be resorted to, to fix the

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No. 54.—*Camden v. Cowley*.—Notes.

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sense of particular terms in the instrument, where they have acquired a peculiar meaning as between the assurers and assured. . . . But it is well settled that a usage can never be set up to affect or vary an express agreement, nor to contradict a rule of law." STORY, J., to the same effect, in *Schooner Reeside*, 2 Sumner (U. S. Circ. Ct.), 569.

It has been said, here and there, that usage is not provable to contradict the plain and unambiguous sense of words as commonly used; but this is too strong; it is certain the usage is competent even in such cases to show what the parties really meant by the words. *Macy v. Whaling Ins. Co.*, 9 Metcalf (Mass.), 363; Browne on Parol Evidence, sect. 57, citing many cases. So a policy on a "whaling voyage" may cover taking of sea-elephants: *Child v. Sun M. Ins. Co.*, 3 Sandford (N. Y. Super. Ct.), 26; and it is probable that the doctrine of *Mitchell v. Henry*, 15 Ch. Div. 181, that mercantile usage is competent to show that "black is white," is the generally approved law of this country. In the sea-elephants case the Court said: "Among the illustrations of this principle, which are quite analogous to the proof offered in the case at bar, will be found the instances of an 'India voyage,' a 'China voyage,' a 'voyage to Africa,' and a 'fishing voyage.' Evidence of other usages in whaling voyages has been sanctioned; as in *Fennings v. Lord Grenville*, 1 Taunt. 241, where it was proved to be the custom that he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it; and in *Baxter v. Rodman*, 3 Pick. 435, where a usage to mate whaling vessels was proved."

A leading case is *Hazard's Adm'r v. N. E. M. Ins. Co.*, 8 Peters (U. S. Supr. Ct.), 557, where there was a representation that a ship was "coppered." It was shown that the word had a different meaning in Boston and New York, and it was held that the usage and meaning in New York, where the representation was made and the ship lay, was controlling.

In *Miller v. Ins. Co.*, 12 West Virginia, 116, it was held that Cypress bayou, a navigable water emptying into Red River, an affluent of the Mississippi, is a "tributary of the Mississippi," within the meaning of a policy.

Parol evidence has been admitted to show that "a room" consisted of a loft not divided into rooms: *Daniels v. Hudson R. F. Ins. Co.*, 12 Cushing (Mass.), 416; to show that fire-works and fire-crackers constitute part of a stock of "fancy goods and Yankee notion store": *Barnum v. Merch. F. Ins. Co.*, 97 New York, 188; to show that a house filled in with brick in front and rear, and supported on one side by a similar wall of another house, and on the other by the brick wall of another house, was regarded as "filled in with brick": *Fowler v. Aetna F. Ins. Co.*, 7 Wendell (N. Y.), 270; that "dangers of the river" may include an accidental fire: *Sampson v. Gazzam*, 6 Porter (Alabama), 123, the Court observing: "Words are but the vehicle of thought, and if by the usage and practice of one part of the community words are used in a sense different from their acceptation among others not engaged in the same pursuit, it would be the height of injustice to interpret their language by a rule not within their contemplation at the time of making the contract." So the word "cargo" may be shown by usage not to include goods on deck. *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & Johnson

## No. 55.—Watson v. Clark.—Rule.

(Maryland), 136; 20 Am. Dec. 424. "Port risk" may be explained in like manner. *Nelson v. Sun M. Ins. Co.*, 71 New York, 455. So of "current funds." *Galena Ins. Co. v. Kupfer*, 28 Illinois, 332; 81 Am. Dec. 284. So of "spitting of blood." *Singleton v. St. Louis Ins. Co.*, 63 Missouri, 63; 27 Am. Rep. 321. So of "cuts." *Houghton v. Ins. Co.*, 131 Massachusetts, 300. So "rags" and "old metals." *Mooney v. Howard Ins. Co.*, 138 Massachusetts, 375; 52 Am. Rep. 277. To show that "loading off shore" includes loading at a bridge pier. *Johnson v. Northw. Ins. Co.*, 39 Wisconsin, 87. To show that bundles of rods are regarded as "bar-iron." *Evans v. Com., &c. Ins. Co.*, 6 Rhode Island, 47. To show that "proceeds" means the goods insured if brought back. *Dow v. Whetten*, 8 Wendell (N. Y.), 160. To explain "fixtures" and "store fixtures:" *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.), 359; "tobacco pressing;" *Sims v. State Ins. Co.*, 47 Missouri, 54; "fire by lightuing;" *Babcock v. Montgomery Ins. Co.*, 4 New York, 326; "ship-yard" (as including adjacent sidewalks and streets): *Webb v. Nat. F. Ins. Co.*, 2 Sandford (N. Y. Super. Ct.), 497; "watchman:" *Crocker v. People's M. Ins. Co.*, 8 Cushing (Mass.), 79; "wood-house:" *White v. Mut. F. Ins. Co.*, 8 Gray (Mass.), 566. To show that neither basements nor attics were considered "floors." *New York B. Co. v. Washington F. Ins. Co.*, 10 Bosworth (N. Y. Super. Ct.), 428. To show that making brooms by hand did not come within "mills and manufactories." *Franklin F. Ins. Co. v. Brock*, 57 Penn. State, 74.

SECTION VI.—*Construction.*

## (2) IMPLIED WARRANTIES AND CONDITIONS.

## No. 55.—WATSON v. CLARK.

(H. L. APPEAL FROM SCOTLAND, 1813.)

## No. 56.—DIXON v. SADLER.

SADLER v. DIXON. •

(1839, 1840.)

## RULE.

IN a voyage policy there is an implied condition or warranty on the part of the assured that the ship is, at the commencement of the voyage, in all respects seaworthy for the voyage.

There is no implied warranty as to seaworthiness at any subsequent period.

No. 55.—*Watson v. Clark*, 1 Dow, 336, 337.**Watson v. Clark.**

1 Dow, 336-349 (14 R. R. 73).

*Insurance.—Voyage Policy.—Warranty of Seaworthiness.*

Action on a policy of insurance on cargo on the *Midsummer Blossom*, an old ship, "at and from Honduras to London." The ship sailed on her voyage, and in a few days after, in weather which, though rough, would not have caused serious damage to a seaworthy ship, made so much water that the captain was obliged to return. In endeavouring to get homewards, she struck upon a rock, and was lost. The House, reversing the decision of the Court of Session, and restoring that of the Judge-Admiral, drew the inference of fact that the ship was not seaworthy when she sailed on the voyage, and held that the insured could not recover on the policy. But the decision was to be without prejudice to any claim for return of premium.

[336] This was an action on a policy of insurance upon the cargo of the ship *Midsummer Blossom*, of which the purser (plaintiff and respondent) was owner. The vessel was lost in November, 1801, on a voyage from Belize River, in Honduras, to London; and the question was, whether the ship was or was not seaworthy at the time when she undertook to perform the [337] voyage \*homeward? The risk insured by the appellants (underwriters) was, "at and from Honduras to London."

The underwriters having refused to settle the loss, the owner raised an action against them in the Admiralty Court; and after a variety of proceedings, and the production of several documents in regard to the state of the ship at different times, the Judge-Admiral pronounced in favour of the underwriters, "finding that the ship or vessel in question, the *Midsummer Blossom*, was not seaworthy when she sailed from Honduras on the voyage insured, and that therefore the policy was null and void, &c., &c." This judgment having been brought under review of the Court of Session, in the form of an action of reduction, the Lord Ordinary appointed a special condescendance of the reasons of reduction to be given in. This having been accordingly done, he pronounced an interlocutor in favour of the owner, "being of opinion that there was no evidence, express or presumptive, that the vessel in question was not seaworthy at the commencement of the risk." The underwriters reclaims to the whole Court; but the Court adhered to the Lord Ordinary's interlocutor, and thereupon the underwriters appealed.

## No. 55.—Watson v. Clark, 1 Dow, 337–339.

It was admitted "that the vessel had not been thoroughly inspected, and ascertained to be seaworthy, immediately before sailing on the voyage in which she was lost, and therefore her seaworthiness, or the contrary, at that time, could not be directly proved. The case therefore rested upon indirect and presumptive evidence, arising from the \* general state of the [\*338] vessel, and events and circumstances of the voyage.

It appeared that the ship was thirty-five years old at the period in question; that she was built in 1766, had been thoroughly repaired in 1781, and received several partial repairs afterwards — one in her hull, immediately previous to her sailing to Honduras. She performed the voyage outward with ease. While in the river Belize, at Honduras, she was struck by lightning, and this destroyed her masts (which were soon replaced), but did no injury to the hull; she was then making twelve inches water in twenty-four hours. It was proved that the respondent had found great difficulty in getting insurances done upon her in London at twenty-five and twenty-six guineas per cent, owing to the age of the vessel, combined with the unfavourable season of the year and the length of the voyage. The insurance in question was done at Aberdeen, at fifteen guineas per cent. The subsequent facts appear in the following protest of the master, first and second mates, and carpenter, to which the Chancellor referred in his observations on the case. They stated "that they sailed in the said ship from Belize River, in Honduras, on Tuesday, the 27th of October, 1801, on a voyage to London, with a cargo of mahogany and logwood, at which time the said ship was, to the best of their knowledge, and as they verily believed, staunch, strong, and fit for the said intended voyage; and at one P. M. came to anchor off Goff's Key. — Wednesday, at daylight, got under way in company with the ship *Hope*, bound for London, and the ship *Nancy*, for Jamaica. — \* Thursday, the 29th October, [\*339] Hat-key bearing west about four leagues from that, took our departure with fresh gales and squally weather. At ten, fresh gales, in mizzentopsail, jib, maintopmast-staysail and Mizzen-staysail. At four A. M., very heavy rain and squally, in one reef of the fore and main topsail. At noon, observed in latitude 17° 18' N., the ship making a deal of water. Friday, the 30th, fresh gales and a very heavy sea from the northward, the ship making so much water as to keep one pump continually at work. At

## No. 55.—Watson v. Clark, 1 Dow, 339, 340.

noon, observed in  $17^{\circ} 50'$  N.; the ship *Hope* on our larboard quarter; a heavy sea, and the ship making ten inches of water in an hour. — Saturday, the 31st of October, the ship continued making much water, pumping her every half-hour. — Sunday, November the 1st, fresh breezes and squally, with a heavy swell from the northward; the ship *Hope* in company; the ship making so much water one watch could scarce keep her free. The people came aft to the captain and complained, wishing him to proceed for Jamaica, as they thought it impossible to go to England with the ship. At noon, observed in latitude  $18^{\circ} 15'$ . — Monday, the 2d of November, fresh breezes from the northward and eastward, and at ten P. M. squally with rain, in jib, mizzentopsail, and one reef of the maintopsail; the ship making a deal more water, two feet and a half in the hour, and seven hands constantly employed at the pump. — Tuesday, November 3, moderate breezes; the ship still making much water; one pump constantly at work; [\*340] the ship \**Hope* in company. Observed in  $18^{\circ} 30'$  N. —

Wednesday, the ship still making two feet and a half water in an hour. At seven A. M. tacked, and hove to, to endeavour to find the leak; at eight tacked ship. — Thursday, squally weather and a heavy sea; the ship making more water, one pump could not keep her free. At noon, observed in  $20^{\circ} 02'$  N.; both pumps at work. — Friday, November 6th, advice of all hands being asked, and both pumps still going, it was concluded best to return back, as they were not ab'e to continue at the pumps; bore down upon the ship *Hope*, and informed them of our situation. At two P. M. bore up for Belize, at which time the ship made upwards of forty inches per hour; steady breezes and clear; find the ship going before the wind does not make so much water. — Saturday, the 7th, fresh breezes and clear; all sail set. At six A. M. made Ambergrease Key, distant about seven miles; squared the yards, and bore more away; the ship still making the same water. — Sunday, November 8th, at six P. M. in foretopgallant-sail, maintopmast-staysail, and jib; at eight in maintopgallant-sail (at six P. M. Ambergrease bore west by south about three leagues); at ten P. M. hauled up the foresail, and lowered the mizzentopsail on the cap; hazy, thick weather; at twelve hove to with her head to the eastward. At half-past twelve the ship struck on Turneff; kept the pump constantly going, but found it of no use, the ship having three feet water in less than an

## No. 55.—Watson v. Clark, 1 Dow, 341, 342.

hour; cleared the boats. At four A. M. the ship had \* nine [\* 341] feet water in her; squally weather with heavy rain; got yards and topmasts down. At noon, the captain and four hands set off for Belize River's mouth, to get every assistance in his power, in order to save all that was possible for the benefit of all concerned."

The following letter, from the captain to the owner, was also referred to by the Chancellor:—

“ HONDURAS, December 9, 1801.

“ I am sorry to state to you the loss of the *Midsummer Blossom*. I sailed from here the 27th of October, in company with the ship *Hope*, Captain Storrow. On the second day after sailing from here, I found the ship made much more water than common, and kept increasing daily. On the 5th of November I encountered a fresh gale, which the ship then made forty-two inches water per hour, so as to keep the pumps constantly going. On the 6th I bore down on the *Hope*, and informed her our situation; and as all hands declared, that if the ship continued making the same water, they would not be able to keep her free longer than three or four days, so I concluded, and thought it most proper, to bear up for the river Belize. I then reckoned in lat.  $20^{\circ} 02'$  N., and lon.  $85^{\circ} 07'$  by my account. On the 7th made the land; at eight P. M. shortened sail; at twelve A. M. hove to; at one A. M. struck, and ashore under the lee side of Turnef, where there she remains. St. George's Key bears from her W. b. N. All materials were saved and sold at public vendue; \*also [\* 342] the ship and cargo, for the benefit of all concerned.”

From this state of the facts two opposite conclusions were drawn by the litigating parties; the underwriters maintaining, that as the vessel had proved to be utterly unfit for the voyage so soon after her sailing, without any adequate cause to produce that unfitness subsequent to the period of her leaving the river Belize, the evident presumption was, that she was not seaworthy at the commencement of the risk; while the owner contended that the leaky state of the vessel, which forced the captain to put back, was owing to the tempestuous weather which she encountered subsequent to the time of her sailing from Honduras Bay; and the evidence of the existence of tempestuous weather during the period

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No. 55.—Watson v. Clark, 1 Dow, 342-344.

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in question consisted of the above documents, and extracts to the same effect from the log-book.

As to the principles of law applicable to the case, it was maintained, on the part of the appellants,

1st, "That in no case ought the loss arising from the inherent inability of the ship to fall upon the insurer;" and "that in every marine contract there was an implied warranty that the ship should be seaworthy, tight, staunch, and strong, properly manned, sufficiently stored, and fully equal to the necessary fatigue of the particular voyage intended at the date of the policy."

2d, That an inherent defect, or want of seaworthiness, must be presumed from the subsequent failure to perform, unless [\*343] that failure should be \* shown to have arisen, subsequent to the commencement of the voyage, from the extraordinary perils of the sea.

3d, That from these leading principles two other subsequent rules followed of necessity; that in questions of this kind, the incapacity of a ship is as certain if she was unable to accomplish the whole as if she was inadequate to the accomplishment of any part of the contracted voyage; and that the legal presumption of inability must, in all cases where there were no stronger counter-presumptions, lay the *onus probandi* upon the assured, the vessel being understood to be warranted to be in a fit condition not only to begin, but to finish her voyage; and that neither the innocence nor ignorance of the assured could avail him against a breach of the implied warranty, the law on that head being absolute.

The respondents contended that the law, as stated on the other side, did not apply to the facts. The vessel was proved, by the evidence of the captain and others, to have been seaworthy when she sailed from England, and had suffered no damage on the voyage; and that her leaky state, after sailing from Honduras, was owing to the stormy weather. Captain Rains, of the navy, stated that her making twelve inches water in twenty-four hours was a matter of no consequence, as very good vessels often did the same.

The appellants, to encounter the inference attempted to be drawn from the effect of the weather, had produced to the Court of Session a certificate from the regulating captain at Leith, [\*344] stating that \* he had read the log-book of the *Midsummer Blossom*, and that there was nothing in the state of the weather, as there described, that could hurt a seaworthy ship.

## No. 55. — Watson v. Clark, 1 Dow, 344, 345.

“Park for appellants, Gaseke and Horner for respondents.

Lord ELDON, L. C., held it to be a clear and established principle, that if a ship was seaworthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with, and the underwriter was liable. But when the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was, that it was from causes existing before her setting sail on her intended voyage, and that the ship was then “not seaworthy;” and the *onus probandi*, in such a case, rested with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage. He did not think himself justified in considering the mere age of the ship, which was thirty-five years, as a sufficient ground of itself for the conclusion that she was not seaworthy; but surely this was a circumstance of some weight in the evidence. The vessel, too, before she sailed, made twelve inches of water in twenty-four hours; but this was a circumstance which in itself was stated in evidence by Captain Rains to be of no great importance; and he (Rains) had said that he would not hesitate to take up a ship for government service that made no more water in the twenty-four hours. It was, however, to be considered, [\*345] that this might be more or less material, according to the age of the ship. The fact of a ship of thirty-five years of age making twelve inches water in twenty-four hours was unquestionably to be viewed in a different light from a new one making the same quantity of water in the same time. In the latter case, it might be no evidence at all of inability; in the former case, in connection with other suspicious circumstances, it undoubtedly might be very material evidence. Then their Lordships would consider the protest of the captain, from which it appeared, that in two days from the time of her sailing she made ten inches of water in one hour, without any adequate cause alleged for it, or any cause, except fresh gales and squally weather. Now, though he did not pretend to much skill in nautical matters, yet he had been in a situation where he had an opportunity of hearing more of the conversation of seamen than perhaps any Judge on the bench, and if he were on board a collier, he should not be much afraid though he heard the seamen talking of fresh gales and squally weather. It was then discovered that the ship was unfit

## No. 55.—Watson v. Clark, 1 Dow, 345-347.

to perform the voyage, and an attempt was made to find out the leak, but the result of this attempt was not stated. If their Lordships could find out any adequate cause of this inability to perform the voyage, arising after the vessel sailed, then she might have been seaworthy; but if they could not, then the presumption was that she had not been seaworthy at the time of setting sail;

and it signified nothing as to this case whether the vessel, [§ 346] after the inability \* had been discovered, was injured

by striking upon a reef of rocks, or in any other way. Then it went on to state the return to Belize River, and that the vessel made upwards of forty inches water in an hour, and that, too, during steady breezes and clear weather; and that the ship could be kept afloat, even by pumping, no longer than three or four days. His Lordship then read the letter of the 9th of December, and observed, that their Lordships would do full justice to this protest and letter (*vide ante*), if they held that no cause was alleged by them for the state of the vessel, except the nature of the weather.

The affidavit of the captain stated that the loss did not happen in consequence of any damage done by lightning, but that the ship, in the thickness of the weather, when returning, struck on a reef of rocks. Be it so; but if it was meant to infer from it that this was the cause of the inability to perform the voyage, which inability had been before admitted when the bowsprit of the vessel was turned round towards Belize River, it was an inference of a fact which was physically impossible.

The true question was, Whether any circumstances which happened between her sailing from Honduras Bay, and her return to Belize, could be fairly considered as accounting sufficiently for the non-seaworthiness of the ship? This was putting it perhaps too strongly. The question was, Whether their Lordships could say that the vessel had been reduced to such a state as that described,

[§ 347] by such causes as were alleged for it? He had considered the case with rather a jealousy of the underwriters, \* and

yet he could not but think that the vessel was not seaworthy at the commencement of the voyage. The case which the respondent himself stated in his own favour required an answer; and surely, under these circumstances, the presumption was such as to throw the *onus probandi* upon the assured. This was a case, then, in which it appeared to him, on the whole, that want of seaworthiness was sufficiently proved. He could not agree with Lord

## No. 55.—Watson v. Clark, 1 Dow, 347, 348.

MEADOWBANK, that there was no evidence, express or presumptive, of a want of seaworthiness at the time of commencing the voyage. He thought there was very strong presumptive evidence of it. He should propose, therefore, to reverse the decision of the Court of Session, and to say, with the Judge-Admiral, that the vessel was not seaworthy at the time of the commencement of the voyage, and that the policy was null and void. Then, as to the question of sending this back again to the Court of Session, if the justice of the case had required it, that must be done. But their Lordships would be cautious how they sent back again a case which had been disposed of there in 1802 or 1803, and was heard here in 1813. Considering the bias which the captain must have, even in the first representation of the case, when it was necessary for him to justify his own conduct, it would be dangerous to send this back again for fresh evidence, after it was discovered where the shoe pinched. Such a step would, upon general principles, be too mischievous for their Lordships to listen to such a proposition in the present case. His noble friend near him (\* Lord REDESDALE), who had presided in the Irish Court [\*348] of Chancery, with so much credit to himself and advantage to his country, and who, in addition to his knowledge of equity, was as good a common lawyer as any in the kingdom, he was happy to find, agreed with him in this opinion.

Lord REDESDALE said he had always understood it to be a clear and distinct rule of law, that if a vessel, in a short time after leaving the port where the voyage commenced, was obliged to return, the presumption was that she had not been seaworthy when the voyage began, and that the *onus probandi* was, in such a case, thrown on the assured. The Court below appeared to have proceeded upon a different principle. This vessel, without any apparent cause of injury subsequent to her leaving port, was obliged to put back, being incapable of proceeding on her voyage. There was not only presumptive, but direct, evidence that she was not seaworthy; for if, upon the statement of facts, it appeared that there was neither bad weather nor anything else to injure the vessel after her leaving port, and yet it was found that she was in a bad condition, and continued increasing in that badness, then it was clear that she could not have been seaworthy when the voyage commenced. The principle upon which his opinion was founded was distinctly recognised in the books and cases.

## No. 56. — Dixon v. Sadler, 5 Mees. &amp; Wels. 405.

The judgment was in the following form:—

"The Lords find that the ship in question, the *Midsummer Blossom*, was not seaworthy when \*she sailed from Honduras on the voyage insured, and therefore find the policy null and void. And it is therefore ordered and adjudged, that the interlocutors complained of be reversed, and the defenders assoilzied. And it is further ordered, that the judgment be without prejudice to any claim of return of premium which the respondents might have had at the commencement of this action."

[A similar judgment was pronounced in another appeal, arising from an insurance on the ship, in which the question was the same.]

### Dixon v. Sadler.

5 Meeson & Welsby, 405-416.

*Insurance. — No Implied Warranty of Seaworthiness after Voyage commenced.*

[495] To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury having, at the trial, found a verdict for the defendant, the underwriter, on this issue: *Held*, on a motion for judgment *non obstante veredicto*, that the plea was bad, and that the underwriters were liable for the consequences of the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast.

Assumpsit on a policy of insurance, dated 22nd of January, 1838, on the ship *John Cook* and cargo, at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The declaration averred the loss of the ship to have taken place on the 19th of May, 1838, by perils of the sea. The defendant pleaded, first, that the vessel was not lost by perils of the sea; secondly, the following special plea: "That, though true it is that the said vessel was by the perils of the sea wrecked, broken, damaged, and injured, and became

## No. 56.—Dixon v. Sadler, 5 Mees. &amp; Wels. 405, 406.

and was wholly lost to the plaintiffs, for plea nevertheless the defendant says, that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct [the same not being barratrous<sup>1</sup>] of the master and mariners of the said ship, whilst the said ship was at sea as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost as therein mentioned, to wit, on the 19th of May, 1838, by wilfully, wrongfully, negligently, and improperly [but not barratrously] throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, crank, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she \* might and would otherwise have been able [\*406] to have safely encountered and endured, "and by means and in consequence of the said wilful, wrongful, negligent, and improper [but not barratrous] conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured, and lost as in the said first count is mentioned." — Verification.

There were other pleas, but the question turned alone on the issue raised by the second plea. The plaintiff replied to it, "that the said wrecking, breaking, damaging, injuring the said vessel, or the loss of the same by the perils of the sea as in the first count mentioned, was not so occasioned by such conduct of the master or mariners of the said ship, in manner and form as in the said plea is alleged," &c.

At the trial before PARKE, B., at the last Spring Assizes for Northumberland, it appeared that the plaintiff was a shipowner residing at Sunderland, and was the owner of the *John Cook*, and had effected the policy in question with the defendant, an underwriter at Lloyd's. The vessel left Rotterdam for Sunderland properly ballasted and equipped on the 15th of May, and arrived on the 19th of May opposite a point called Seaham, which was about

<sup>1</sup> The words within brackets were inserted in the plea during the argument, at the suggestion of the Court.

## No. 56.—Dixon v. Sadler. 5 Mees. &amp; Wels. 406—413.

four miles from the port of Sunderland. On arriving there, and having a pilot on board, the master commenced heaving part of his ballast overboard, as was proved to be usual on such occasions. Whilst this was going on, the vessel drifted to the northward, and a strong squall coming on from the southeast, the ship was upset on her broadside, and her masts lay on the water. Every endeavour was made to right her, but in vain. She afterwards sunk off Ryhope, drifted on shore, and became a total wreck. If the

crew had not removed the ballast, the ship would most  
[\* 407] likely have stood the squall. \* It was objected at the

trial that this was not a risk which the underwriters had undertaken to indemnify against. The learned Judge was of opinion that the word "wilful" in the plea meant that the ballast was knowingly thrown overboard, and in a negligent manner, but said he would reserve that question for the opinion of the Court. And his Lordship left two questions to the jury: first, was it negligent conduct to throw the ballast overboard before arriving in harbour? secondly, did they think the master exercised a reasonable discretion in throwing overboard? They found, as to the first question, that they did think it negligent generally to throw over the ballast; secondly, that the master did right, supposing the practice itself authorised him. A verdict was thereupon entered for the defendant on the second issue, the learned Judge giving the plaintiff liberty to move to enter a verdict on that issue, if the Court should be of opinion that his construction of the meaning of the word "wilful," as used in the plea, was incorrect.

Alexander having, in Easter Term last, obtained a rule to enter a verdict accordingly, or for judgment *non obstante veredicto* [and this having been argued, the Court took time for consideration].

[\* 413] \* The judgment of the Court was now delivered by PARKE, B.—In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the second, for the defendant. This plea stated, "that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wilful, wrongful, negligent, and improper conduct of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly throwing overboard

## No. 56.—Dixon v. Sadler, 5 Mees. &amp; Wels. 413, 414.

so much of the ballast, that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for judgment *non obstante veredicto*, it occurred to the Court to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration; and, as the fact certainly was, that the crew were not guilty of barratry, it was very properly agreed that the plea should be amended by inserting the words, "but not barratrously," after the words, "negligently and improperly." And the plea, therefore, in its present shape, raises the question, whether the underwriters are liable for the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my Brothers ALDERSON, GURNEY, MAULE, and myself. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict. The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured \* and the under- [\* 414] writer, on a time policy. In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk: *Annen v. Woodman*, 3 Taunt. 30 (12 R. R. 663); *Hibbert v. Martin*, Park on Insurance, Vol. 1, p. 299, n., 6th edition; and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no

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No. 56.—Dixon v. Sadler, 5 Mees. & Wels. 414, 415.

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defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of *Busk v. Royal Exchange Company*, 2 B. & Ad. 72 (20 R. R. 350); *Walker v. Maitland*, 5 B. & Ad. 171 (24 R. R. 320); *Holdsworth v. Wise*, 7 B. & C. 794 (31 R. R. 299); *Bishop v. Pentland*, 7 B. & C. 219 (31 R. R. 177); and *Shore v. Bentall*, 7 B. & C. 798 n. (31 R. R. 302 n.); nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to

the omission to take proper care of it, or to the improper  
[\* 415] \*act of shipping it, or cutting it away; nor could it make

any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences. The only case which appears to be at variance with this principle is that of *Law v. Hollingsworth*, 7 T. R. 160, in which the fact of the pilot who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought (under what circumstances is not distinctly stated), appears to have been held to vitiate the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions is, that, if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more com-

No. 56.—*Sadler v. Dixon*, 8 Mees. & Wels. 897.

plete indemnity to the assured, which is the object of the contract of insurance. If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstance of this being a time policy makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the seaworthiness \* or navigation of the [\*416] vessel, is settled; but it may be safely laid down that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises, on the ground of seaworthiness of the vessel, until that unseaworthiness was caused by the throwing overboard a part of the ballast, by the improper act of the master and crew; and, as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

*Rule absolute to enter judgment for the plaintiff non obstante veredicto.*

The case was subsequently brought up to the Exchequer Chamber, where it is reported as *Sadler v. Dixon*.

**Sadler v. Dixon.**

8 Meeson &amp; Welsby, 895-900.

The case having been again argued, the Court took [897] time to consider, and the judgment of the Court was delivered by

TINDAL, Ch. J.—This was an action on a policy of insurance upon the ship *John Cook* and cargo, from the 17th of January, 1838, for six calendar months, and the loss was stated in the declaration to have happened from perils of the sea, within the time for which the policy was made. The plea alleges the loss to have been occasioned wholly by the wilful, wrongful, negligent, and improper conduct, the same not being barratrous, of the master and mariners of the said ship; that is to say, “by wilfully, wrongfully, negligently, and improperly, but not barratrously, throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, and wholly unseaworthy, and unfit and unable to encounter the perils of the sea,

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No. 56.—Sadler v. Dixon, 8 Mees. & Wels. 897-899.

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which she might and would have been able to have encountered: and in consequence of the said wilful, wrongful, negligent, and improper, but not barratrous conduct of the said master and mariners, the said ship became wrecked and lost by perils of the sea, which perils, but for the said conduct of the master and mariners, she would have safely encountered."

The replication traversed "that the said wrecking and [\*898] \*damaging of the said vessel, or the loss of the same by

perils of the sea, as in the first count mentioned, was occasioned by such conduct of the master or mariners of the said ship, in manner and form, &c.;" upon which traverse issue was joined, and found for the defendant. And the Court below having given judgment for the plaintiff *non obstante veredicto*, the question raised by the writ of error is, whether the plea is or is not good in law.

No stress was laid, in the course of the argument before us, upon any distinction to be taken between the implied warranty on the part of the assured as to the seaworthiness of the ship, in the case of a policy on a particular voyage, and of a time policy; nor do we think any such distinction can be held to exist; at all events, no distinction by which the obligation, on the part of the assured, in the case of a time policy, can be held to be increased or extended. But the broad ground of argument taken by the plaintiff in error has been, that if the loss is occasioned by the wilful and wrongful act of the master and crew, but not amounting to barratry, it must be held to be occasioned by a cause against which the underwriter had not bound himself to indemnify.

Looking, however, at the allegation in the plea, it appears to us that the meaning of the words "wilful and wrongful" is so qualified by the express averment that such conduct of the master and mariners did not amount to barratry, as that the existence of any fraudulent or improper motive, on the part of the master and crew, is altogether excluded; and therefore, in effect, that the meaning of the word "wilful" is reduced to little, if anything, more than the word "voluntary," — a term that must be necessarily applied to every act done by the master and mariners in the course of conducting the navigation and working of the ship; so that every act of heaving or casting the anchor, or of setting the sails,

[\*899] or of directing the helm, which may have been the immediate occasion of the \* loss of the ship, may, in that qualified sense, be termed their "wilful act." And again,

No. 56.—**Sadler v. Dixon, 8 Mees. & Wels. 899, 900.**

the word “wrongful,” when fraud and all other improper motives are excluded by the qualification above adverted to, bears no stronger sense in the plea than that the particular act done was not the right course, but, on the contrary, a negligent or incorrect course to pursue. And, after all, the general allegation of the character and quality of an act, as that it is wrongful, or malicious, or injurious, or the like, cannot carry a charge against the party to whom it is imputed further than the particular act itself specified in the pleadings will warrant. The question, therefore, in substance becomes this: whether the throwing the ballast overboard by the master and crew (which must be considered as their voluntary act, and also a negligent and improper act), whereby the ship became unseaworthy, excuses the underwriter. It is obvious that such an act (all unlawful motive being excluded by express averment) may be attributable to an error or defect in judgment, both as to the fact of discharging the ballast at all, and further, as to the exact extent to which it was actually discharged; and it seems difficult, on principle, to hold that the underwriter shall be excused where the loss is occasioned by the mere want of judgment or the negligence of the master and mariners,—which occurred in this particular case,—and that he shall not be also held to be excused in every case, where the loss can be traced to mistake of judgment, or an act of carelessness or negligence in the ordinary navigation of the vessel; in which latter cases the loss is confessedly held to fall within the meaning of perils of the sea.

But without entering into a further discussion of the principle, we think, upon the later authorities, the rule is established, that there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew during the whole course of the voyage. \* The case of *Law v. Hollingworth*, [\*900] 7 T. R. 160, must be allowed to bear against the principle so laid down by those later authorities. The ground of decision in that case appears to have been, that there was no pilot on board during the time the ship was sailing up the river Thames, which was required by the statute 5 Geo. II., and that it was an implied contract on the part of the assured that there should be such person. This at least appears the ground of Lord KENYON’s judgment, although certainly the other two Judges seem to have considered that it was a loss arising from an act of gross negli-

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Nos. 55, 56.—*Watson v. Clark; Dixon v. Sadler.*—Notes.

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gence. The decision of that case may be maintainable on the ground of an implied warranty to observe the positive requisitions of an Act of Parliament; but if it is to be taken as an authority that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew, throughout the voyage, we think it cannot be supported against the weight of the later authorities. (See *Busk v. Royal Exchange Company*, 2 B. & Ald. 73 (20 R. R. 350); *Walker v. Maitland*, 5 B. & Ald. 171 (24 R. R. 320); *Holdsworth v. Wise*, 7 B. & C. 794 (31 R. R. 299); *Bishop v. Pentland*, 7 B. & C. 219, 1 Man. & R. 49 (31 R. R. 177); and *Shore v. Bentall*, 7 B. & C. 798 n., 1 Man. & R. 11 (31 R. R. 302 n.).)

Upon the whole, we think the plaintiff below is entitled to judgment *non obstante veredicto*, and that the judgment of the Court below must be affirmed. *Judgment affirmed.*

#### ENGLISH NOTES.

The implied warranty is similar to the implied warranty of seaworthiness—in the sense of fitness to carry the goods on the voyage—that the law imposes upon shipowners towards the owners of the goods which they carry. See Nos. 4 and 5 of “Bill of Lading,” and notes 4 R. C. 697 *et seq.*

The principle of *Watson v. Clark* was followed by Lord ELDON in directing the House of Lords in the case of *Parkes v. Potts* (another Scotch case in 1815), 3 Dow, 23, 15 R. R. 1, where the ship had to put back, owing to her leaky condition, the day after sailing.

In *Pickup v. Thames Marine Insurance Co.* (C. A. 1878), 3 Q. B. D. 594, 47 L. J. Q. B. 749, 39 L. T. 341, 26 W. R. 689, it is clearly pointed out by the judgments of the Lords Justices (BRETT, L. J., and THESIGER, L. J.) that Lords ELDON and REDESDALE in *Watson v. Clark* did not decide any hard and fast rule of law, but merely decided that the Court below, who were judges of fact as well as law in that case, ought to have drawn the inference of fact that the ship sailed in an unseaworthy state; and accordingly, in the case of *Pickup v. Thames Marine Insurance Co.*,—the Judge at the trial having directed the jury that the fact of a vessel having put back eleven days after starting on her voyage was sufficient to shift the burden of proof and to make it incumbent on the insured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail,—the Court of Appeal held that this was a misdirection, and that there must be a new trial.

In connection with this subject may be mentioned a case which turned upon the duty as to seaworthiness imposed by section 5 of the Merchant

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Shipping Act, 1876 (now substantially embodied in section 458 of the Merchant Shipping Act, 1894). The statutory duty (in the words of the Act of 1876) is: “that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same.” In *Hedley v. Pinkney & Sons’ Steamship Co.* (H. L. 1894), 1894, A. C. 222, 63 L. J. Q. B. 419, 70 L. T. 630, 42 W. R. 497, a question arose from a man falling overboard in consequence of neglect to ship the stanchions and rails which had been provided for the purpose of making level the bulwarks at a point where the permanent bulwarks were lowered for the convenience of shipping goods. It was held that this neglect did not render the ship unseaworthy within the meaning of the section.

**AMERICAN NOTES.**

This subject has been considered in notes, *ante*, vol. 4, p. 723, vol. 5, p. 272. Both principal cases are repeatedly cited in Parsons on Marine Insurance. It is scarcely necessary to accumulate cases to substantiate the first branch of the Rule, as there is no conflict. It will be sufficient to cite *Warren v. United Ins. Co.*, 2 Johnson Cases (N. Y.), 232; 1 Am. Dec. 164 and notes, 165; *Barnewall v. Church*, 1 Caines (N. Y.), 217; 2 Am. Dec. 180; *Flemming v. Marine Ins. Co.*, 4 Wharton (Penn.), 59; 33 Am. Dec. 33 and note, 37 (citing *Watson v. Clark*); *Taylor v. Lowell*, 3 Massachusetts, 331; 3 Am. Dec. 141; *Dupeyre v. West. M. & F. Ins. Co.*, 2 Robinson (Louisiana), 457; 38 Am. Dec. 218; *Hazard’s Adm’r v. N. E. M. Ins. Co.*, 8 Peters (U. S. Supr. Ct.), 557; *Cincinnati M. Ins. Co. v. May*, 20 Ohio, 211; *Donnally v. Merch. Mut. Ins. Co.*, 28 Louisiana Annual, 939; 26 Am. Rep. 129.

On the second branch of the Rule the American doctrine has one qualification. It is generally held that unseaworthiness arising after the commencement of the voyage shall not operate as a defence, unless it was the cause of the loss and resulted from the negligence or misconduct of the assured. *McDowell v. Gen. M. Ins. Co.*, 7 Louisiana Annual, 684; 56 Am. Dec. 619. The Court observe: “It is proper here to remark, that although it seems to be the great leading principle of the English doctrine of seaworthiness that there is no implied warranty of seaworthiness, except at the commencement of the voyage, yet the law in the principal commercial States of this Union is at variance with the English doctrine, and gives a wider extent to the implied warranty. It holds it to be the duty of the assured to keep his vessel seaworthy during the voyage, if it be in his power to do so; and if from the neglect of the owner or his agents the vessel becomes unseaworthy, by damage or loss in her hull or equipments, during the voyage, the owner must repair the damage or supply the loss, at the port of refuge, refreshment, or trade. The underwriter will be discharged from liability for any loss, the consequence of such want of diligence.” 3 Kent’s Com. 288, 289; Arnould on Marine Insurance, 666.

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"The American doctrine, however, is qualified to this extent, that unseaworthiness arising after the commencement of the voyage has not a retrospective operation, so as to destroy a just claim in respect of losses which have occurred prior to the breach of the implied warranty ; and also that if the ship sailed seaworthy for the voyage, subsequent unseaworthiness shall not operate as a defence, except where the loss is distinctly shown to have been occasioned by it, and the unseaworthiness itself to have arisen from the negligence or misconduct of the assured or his agents. The language of Mr. Kent, with regard to this latter qualification, is very apposite, by reason of the illustration it gives to the present controversy. 'The owner,' says he, 'is bound to keep the vessel in a competent state of repair and equipment during the voyage, as far as it may be in his power. If this be not the case, and a loss afterwards happens, which could by any means be either increased or affected by a prior breach of the implied warranty of seaworthiness when the policy attached,—as, for instance, if the master should omit to take a pilot at an intermediate port where he ought and might have done it, and the vessel be, two years afterwards, lost by capture; or if he sailed without sufficient anchors, and the vessel be afterwards struck with lightning,—would the insurer be discharged? The better opinion would seem to be that he would not be discharged.'

3 Kent's Com. 289. See also *Paddock v. Franklin Ins. Co.*, 11 Pick. 227.

"Mr. Arnould advocates the English rule, and considers it decidedly preferable, both as giving the assured a more complete indemnity, and also preventing many nice and difficult inquiries, which, in his opinion, the other system has a direct tendency to produce. But it seems to us, on the other hand, that the American rule is more consistent with public policy, considered with reference to the preservation of life and property."

In *Copeland v. N. E. M. Ins. Co.*, 2 Metcalf (Mass.), 440, SHAW, Ch. J., after quoting the language of Baron PARKE, in *Dixon v. Sadler*, to the contrary of the American doctrine as above set forth, remarks: "If this is to be taken as limited to the cases where the master, officers, and crew act in their own proper sphere, as practically managing and conducting the navigation, and where the master does not stand in the relation of representative and agent of the owners, we think it not inconsistent with the general principle, leaving the owner still bound by the acts of the master, so far as by law and the usage of navigation he is the representative of the owners, executing their express or implied orders, and doing all such acts as an owner himself might and would do, if present. Unless taken with this implied limitation, the principle would seem to be laid down too broadly, and come in conflict with some of the established rules of insurance law."

Parsons says that this American doctrine "is quite well settled," citing the Massachusetts cases, and *Hazard's Adm'r v. N. E. M. Ins. Co.*, 1 Sumner (U. S. Circ. Ct.), 230; 8 Peters (U. S. Sup. Ct.), 557; *Stewart v. Tenn. M. & F. Ins. Co.*, 1 Humphreys (Tennessee), 242, which sustain his assertion.

"In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subse-

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quent risk or loss, provided that such loss be not the consequence of such omission. A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy, and not caused or increased by such particular defect." *Union Ins. Co. v. Smith*, 124 United States, 405, citing *Paddock v. Franklin Ins. Co., supra*. This doctrine is precisely supported by *Am. Ins. Co. v. Ogden*, 20 Wendell (New York), 287: *Peters v. Phoenix Ins. Co.*, 3 Sergeant & Rawle (Penn.), 25; *Merchant's M. Ins. Co. v. Sweet*, 6 Wisconsin, 670. In the last case the Court said: "We suppose it to be a well-settled rule in the law of insurance in this country, that in addition to the implied warranty of seaworthiness which applies to the state of the vessel at the commencement of the risk or voyage, and which must be strictly complied with as a condition precedent to the policy attaching, it is also the duty of the assured from time to time, during the continuance of the policy or voyage, to repair the vessel and keep her in a suitable condition for the service in which she is engaged; and if they fail to do so, and a loss happens which is attributable to that cause, the assured and not the underwriters must sustain it." Citing *Copeland v. N. E. M. Ins. Co.*, 2 Metcalf (Mass.), 432, which cites *Dixon v. Sadler*. See to the same effect, *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio, 72; *Cudworth v. So. Car. Ins. Co.*, 4 Richardson Law (So. Car.), 416; 55 Am. Dec. 692.

In the *Copeland* case above cited the point of decision was that where a vessel was originally seaworthy, the fact that the master subsequently became incapable of managing it, by reason of insanity, did not render her unseaworthy. SHAW, Ch. J., reviewed the English decisions in a very learned manner, paying especial attention to *Dixon v. Sadler*, of which he observes, after quoting Baron PARKE's assertion that original sufficiency is enough: "If this is to be taken as limited to the cases where the master, officers, and crew act in their own proper sphere, as practically managing and conducting the navigation, and where the master does not stand in the relation of representative and agent of the owners, we think it not inconsistent with the general principle, leaving the owner still bound by the acts of the master, so far as by law and the usage of navigation he is the representative of the owners, executing their express or implied orders, and doing all such acts as an owner himself might and would do, if present. Unless taken with this implied limitation, the principle would seem to be laid down too broadly, and come in conflict with some of the established rules of insurance law.

"It may be remarked, upon this review of the English authorities, that they mostly turn upon the question whether there has been a breach of the implied warranty of seaworthiness, wholly exonerating the underwriters; or whether there has been negligence or mismanagement of the officers, pilots, and mariners, originally competent in point of number, skill, and capacity in the performance of what may be considered their respective and appropriate professional duties. No case has gone the length of deciding, that where

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there is a long voyage consisting of several stages, or where there is a policy on time, which may last several years, if the vessel becomes damaged or unfit for navigation, it is not the duty of the owner to make the necessary repairs to fit her for the service on which she is destined, and in case of failure to do so, and a loss happens from that cause, that the insurers are liable, as for a loss by one of the perils insured against. Nor, we think, has any case decided, that, in the absence of proof of any other provision for the performance of this duty, the captain shall not be presumed to be the agent of the owner for that purpose. If so, we think the English and American cases may be reconciled."

The American doctrine above mentioned is laid down in *Dupeyre v. West M. & F. Ins. Co.*, 2 Robinson (Louisiana), 457; 38 Am. Dec. 218; *Lapene v. Sun M. Ins. Co.*, 8 Louisiana Annual, 1; 58 Am. Dec. 668 and notes, 671, citing *Dixon v. Sadler*.

The question is elaborately considered by SHAW, Ch. J., *obiter*, in *Paddock v. Franklin Ins. Co.*, *supra*. He says: "Of course it is not contended that the owner is bound to keep the ship seaworthy, to the effect that the underwriters are discharged at the time of her becoming unseaworthy; for the very disasters which disable and render her unseaworthy are those against which the underwriters engage to indemnify. The proposition then is, that the underwriters are discharged from and after the time that it was in the power of the owner to repair and make her seaworthy, and he has failed to do so.

"That the owner of a ship is bound to keep his ship in a competent state of repair and equipment, during the voyage; that if damage is sustained in her hull, sails, or equipments, he is bound to repair and supply them as soon as he conveniently can; that if the crew become disabled by the death, sickness, or desertion of men, he shall, as soon as practicable, procure others; and so that in a certain sense he is bound to *keep* his ship seaworthy, is no doubt true. But what shall be the consequence of a failure and breach of duty in this respect, seems not to be so well settled. Are each and all of these requisites, included in the implied warranty of seaworthiness, regarded as strict *conditions precedent*, to the effect that if not complied with, on the part of the owner, the contract of insurance becomes wholly annulled? Or are they obligations and duties binding on the owner, and if not performed on his part, and if in consequence of such non-performance a loss happens, or by any reasonable probability may be ascribed to that cause, the effect will be that such loss will fall upon the assured, and not upon the underwriter? If it is contended that a vessel must be seaworthy, for the remainder of the voyage, in all respects, at every stage of the voyage, as well as its commencement, and at her departure from every port of refuge or refreshment, using the term 'seaworthiness' in this case in its technical sense, as an implied warranty operating as a condition precedent, so that if not complied with the underwriters would be wholly discharged from their contract, it is certainly a proposition which would require great consideration. The effect would be, that if a vessel were to sail from an intermediate port without a pilot, where, by the course of navigation, a pilot ought to be employed, and two years after be lost by capture; or if she were to sail without sufficient anchors, and afterwards if

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the progress of the voyage be struck by lightning and burnt, although the defect which constituted unseaworthiness did not, and by no possibility could, contribute to the loss that ensued, still the underwriters would not be liable. It would seem to be more consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold *that, after the policy has once attached*, the implied warranty should be so construed as to exempt the underwriter from all loss or damage which did or might proceed from any cause thus warranted against; but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty. In a recent case, where a ship insured *at and from* a port sailed on her voyage in an unseaworthy condition, by being overloaded, but the defect was discovered before any loss had accrued, and the vessel put back and part of the cargo was discharged, by means of which she was rendered seaworthy, and afterwards a loss happened, in no degree attributable to her having been overladen and unseaworthy when she sailed, it was held that the underwriters were responsible for such loss. The circumstance that the insurance was *at and from* the port, so that the policy attached and the risk commenced before sailing, was not expressly relied upon, or made the avowed ground of the decision; but such was the fact, and would seem to reconcile it with the course of decisions. *Weir v. Aberdeen*, 2 Barn. & Ald. 320. A similar case occurred in Pennsylvania. *Garrigues v. Coxe*, 1 Biinn. 592.

“But this question does not necessarily arise in the present case, and therefore the Court are not called upon to give any definitive opinion upon this point. The loss of the *Tarquin* was occasioned by foundering at sea, in consequence of springing aleak. If this was, or might be, attributable to her sailing from Pernambuco in such a state, owing to the want of repairs and supplies, which it was the duty of the owner to furnish, so that she was not tight, staunch, and strong, and reasonably well fitted to prosecute and complete the voyage insured, then it is obvious that the leak, and consequent loss, were, or for aught that appears might be, owing to this defective state of the ship: and so, whether the contract were discharged or not, the underwriters would not be liable. If the vessel was technically unseaworthy, and the implied condition of the part of the assured not complied with, the underwriters would be discharged, because the contract was no longer in force when the loss happened; but if not technically unseaworthy, still the loss happened or might have happened for want of repairs which the owner was bound to make,—a loss against which the underwriters were not bound to indemnify, and so they could not be held liable, because their contract was not broken.”

The Canada Courts follow the English rule in disregarding subsequent unseaworthiness, although arising from the negligence of the master or crew. *Woodhouse v. Prov. Ins. Co.*, 31 Up. Can. Q. B. 176; *Leroux v. Merch. Ins. Co.*, Ramsay App. Cases (Lower Can.), 374.

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No. 57.—**Bouillon v. Lupton**, 33 L. J. C. P. 37, 38.—Rule.

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No. 57.—BOUILLOON *v.* LUPTON.

(1863.)

RULE.

If the voyage consists of distinct sections requiring different conditions of seaworthiness, and it is usual in such a voyage to supplement and complete the equipment at the different points, it is a sufficient compliance with the implied warranty if the ship starts on each section of the voyage properly equipped according to the reasonable requirements and the usual course of conducting the voyage.

**Bouillon v. Lupton.**

33 L. J. C. P. 37-45 (s. c. 15 C. B. (N. S.) 113; 10 Jur. (N. S.) 422; 8 L. T. 575; 11 W. R. 966).

*Insurance.*—*Voyage-policy.*—*Implied Warranty of Seaworthiness.*—*Distinct Sections of Voyage.*

[37] A policy of insurance was effected on a ship from Lyons to Galatz, warranted to sail on or before a certain day. The ship left Lyons before the day in question, fully equipped for the river voyage, but with only a river captain and crew, and without her masts, anchors, and other portions of her [38] tackle which were necessary for her sea voyage. She could not possibly have made the river voyage with her masts up and her heavy tackle on board, and it was usual in similar adventures to take these and other things necessary for the sea voyage on board at Marseilles. The required additions were, in this case, made at Marseilles without unreasonable delay, but the ship did not leave Marseilles until after the day appointed. *Held*, looking at the nature of the voyage and to mercantile usage, that the ship had complied with the warranty to sail on a certain day, and with the implied warranty of seaworthiness.

A vessel, having a reasonable excuse for delay in the course of her voyage, in order to make certain alterations in her equipment, increased the delay by waiting for other ships which were about to perform the same voyage, in order that she might sail in company with them. The jury found that a prudent captain would have followed this course. *Held*, that the delay was justifiable on this ground.

The declaration stated that by a policy of insurance, bearing date the 6th of September, 1861, the plaintiffs caused themselves to be insured, lost or not lost, at and from Lyons to Galatz, and

while there for ten days, with leave to call at all ports and places in the Mediterranean for all or any purpose, upon the body, tackle, &c., of and in the ship or steamer *Bourdon*, beginning the adventure at Lyons as above, and continuing the same during the said voyage, and until the said ship and premises should be arrived at Galatz, and while there for ten days, against perils of the sea and certain other perils and adventures as therein mentioned. And it was thereby declared that it should be lawful for the said ship and premises in that voyage to proceed and sail to, and touch, and stay at any ports or places whatsoever and wheresoever, and with leave to tow and be towed, without being deemed any deviation, and without prejudice to that insurance; and that the said ship and premises were and should be valued at, on hull, &c., valued £3000, machinery £3000. To pay average on each as if separately insured, and general average as per foreign statement, if so made up. And by the said policy the said ship and premises were warranted free from capture and seizure, and the consequences of any attempt thereat. And the said ship was warranted to sail on or before the 15th of August, 1861. And by a memorandum thereunder written the ship and premises were warranted free from average under £3 per cent, unless general, or the ship be stranded. That the defendant had notice of all the premises, and thereupon, in consideration of a certain premium paid to him by the plaintiffs for the insurance of £100 upon the said ship and premises in the said policy mentioned, the defendant subscribed the said policy for the said sum of £100, and became an insurer to the plaintiffs of and upon the said ship and premises to that amount, and upon the terms and conditions of the said policy. That the plaintiffs were then and from that time until and at the time of the loss thereafter mentioned interested in the said ship and premises to the amount of all the insurance to them insured thereon, and that Messrs. Morice & Dixey effected the said policy as their agents and on their behalf. That the plaintiffs performed and complied with all warranties in the said policy contained, and that the said ship with the premises on board thereof departed on her said voyage, and while she was proceeding on her said voyage, and during the continuance of the said risk, the said ship and premises were, by perils insured against, wholly lost. That the plaintiffs did all things on their part to be done, and all things had happened, and all times elapsed to entitle the plaintiffs to be

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paid by the defendant the said sum of £100 so insured by him as aforesaid, but the defendant had not paid the same.

Second count on a precisely similar policy of the same date on a ship called *Papin No. 1*. Third count, on a similar policy of the same date on a ship called *Papin No. 6*.

Third plea to these three counts, that the said ships and premises respectively did not depart on the voyages insured as in those counts respectively alleged. Fifth plea, that the said ships and premises respectively did not sail on or before the 15th of

August, 1861, within the true intent and meaning of the [\*39] warranties \*contained in the said policies respectively.

Sixth plea, that at the time when the said ships and premises respectively separated and set sail on the voyages insured by the said policies respectively, they were respectively not seaworthy for their respective voyages. Seventh plea, that before the respective losses in the three counts mentioned the said ships and premises respectively wrongfully and improperly delayed proceeding upon, and deviated from, the voyages respectively insured.

Issue was joined on these pleas.

At the trial, before COCKBURN, Ch. J., at the last Kingston Spring Assizes, the following facts were proved.

The three vessels in question were river steamers, formerly in use upon the Rhone, but being no longer required for that purpose, an agreement was entered into, on the 11th of June, 1861, that their owner should repair and strengthen them, in order to fit them for a voyage from Lyons to Galatz, which is about one hundred miles up the Danube. It was intended that the ships, if they arrived in safety, should be used for the navigation of that river.

Evidence was given at the trial that, if the ships sailed by the day named in the policy, there was a greater prospect of their reaching their destination in safety than if they sailed later, the weather being likely to be more favourable in the earlier season.

The first vessel which left Lyons was the *Papin No. 6*. She started on the 24th of July with a river crew and captain, and without her masts, anchors, and other heavy articles which it was impossible for her to carry on board during the river voyage. She arrived at Arles on the 28th of July, and there took on board her sea captain and some of her sea-going crew, and did all that was necessary to render her fit for the voyage from thence to Marseilles.

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There would have been no difficulty in the vessel making the voyage from Arles to Marseilles fully equipped for her voyage on the open sea, but such equipment was not necessary for her safety on that part of the voyage, and it was much more convenient, and caused less delay, that her equipment should be completed at Marseilles rather than at Arles. She arrived at Marseilles on the 29th.

The two other vessels left Lyons on the 2nd of August, and arrived at Arles on the 6th. The *Bourdon* arrived at Marseilles on the 7th, and the *Papin No. 1* on the 8th. All the circumstances relating to the voyage of these two vessels as far as Marseilles are the same as those relating to *Papin No. 6*. According to the French law, it would have been necessary under any circumstances that the ships should call at Marseilles in order to obtain sailing licenses. Before these licenses are granted the ships must be surveyed by an officer called the *capitaine visiteur*. This officer has power to direct any alterations or additions on board the ship which he may consider necessary, and when these are completed she is again surveyed by the same officer, and so on until he grants a certificate of completeness. The vessels in question were surveyed for the first time on the 16th of August, when certain additional tackle was directed to be added. They were again surveyed on the 19th, and the final certificate granted. They were ready for sea on the 20th, but did not sail before the 23rd on account of the bad weather.

The explanation given at the trial why the *Papin No. 6*, which arrived at Marseilles a week before the other two, was not ready earlier, was that she was kept back in order that all three vessels might sail in company. A captain in the French navy was called, who stated that he considered that a prudent course to pursue, giving as his reason for so thinking that he did not consider either of the vessels to be safe, and that he should be sorry to sail in either of them without company.

The bulk of all that was done to all three vessels was the addition of those things which, as already explained, were only necessary for the voyage on the open sea, and which it was impossible to have on board during the river navigation, though there were some additions and some repairs, especially to the rudder, which were of such a nature as that they might have been completed at Lyons. With regard to these, however, the plaintiff gave evi-

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dence, either that they were rendered necessary since the vessels left Lyons, or that they were of so slight a nature that no additional delay was caused by their completion at Marseilles instead of at Lyons. In other respects there was no delay at Mar-[\*40] seilles \* or elsewhere except in the vessel *Papin No. 6*, waiting for the other two, as above mentioned. Taking the voyage as divided into three parts, from Lyons to Arles, from Arles to Marseilles, and from Marseilles to Galatz, the vessels were properly equipped for each part of the voyage when they commenced each respectively. All three vessels reached the Black Sea in safety about the middle of October, but, immediately after their arrival there, a storm came on, and they all three went to the bottom.

The jury found a verdict for the plaintiffs. They also found specially with respect to the *Papin No. 6*, that if it were not justifiable for her to wait for the company of the other two vessels, her delay at Marseilles was unreasonable; but that they were of opinion that her so waiting was justifiable, and that a prudent captain would have kept her, that she might sail together with the others.

Bovill, in Easter Term, moved, pursuant to leave reserved, to set the verdict aside, on the ground, first, that the warranties as to sailing on or before the 15th of August were not complied with; secondly, that the vessels were bound to sail on or before that day properly equipped for the voyage, without being delayed afterwards for the purpose of preparation and being made ready for the voyage; thirdly, that the vessels were not fit and ready and in a proper state for the voyage, and that the delay at Marseilles was not justifiable; fourthly, that the vessels were not seaworthy at Lyons, nor at the time of their commencing their voyage in the open sea; and as to the vessel *Papin No. 6*, on the ground that the delay at Marseilles in waiting for the other vessels was not justifiable. He obtained a rule on all these grounds, and also on the ground that the verdict on the last point was against the evidence.

H. Lloyd and W. Williams showed cause. — The meaning of the warranty to sail on or before the 15th of August is that the vessel shall be in prosecution of her voyage on that day, which she was the moment she left Lyons. In this respect, this case is something like that of *Cochrane v. Fisher*, 2 Cr. & M. 581; (in error)

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1 Cr. M. & R. 809, 3 L. J. (N. S.) Ex. 185; but the question here rather turns on what is a compliance with the implied warranty of seaworthiness. What is the nature of this implied warranty was fully explained in *Biccard v. Shepherd*, 14 Moore's P. C. 471. It is that the vessel shall, at the commencement of the voyage, be properly manned and equipped for it in all respects. But the principle is there distinctly recognized that, if the voyage be of such a nature that a different state of preparation is necessary for different parts of it, then the warranty is complied with, if the vessel is properly manned and equipped for that stage of the voyage in which the loss happens. That this was so here in point of fact is not denied, but it is said there was some special intention here that the equipment of the ships should be so arranged that they might accomplish their voyage during a certain season of the year. The policies, however, contain nothing more than the ordinary warranty to sail on or before a certain day. The vessels did leave Lyons on that day, and it is entirely in accordance with necessity and convenience and mercantile usage that they should only then be in a sufficient state of preparation to perform the river navigation. This is precisely similar to vessels intended to be employed in the Greenland fisheries, which do not usually take their extra crew and tackle on board till they get to the Orkneys.

Then, if it be once admitted that a vessel may change her state of preparation during the voyage, when the nature of the voyage itself changes, it is clear that a reasonable time for making the change must be allowed also. The question, therefore, resolves itself into one of delay. But there was no delay on the part of the plaintiffs or their agents, at Marseilles, in making the necessary changes. For any delay caused by the surveys, the plaintiffs are not responsible, as that is done under a law of 1791, from which there is no escape. The circumstance is somewhat different as to the *Papin No. 6*, but the question, whether or not the additional delay in that case was reasonable, is disposed of by the finding of the jury. It is true that they have found specially why they considered the delay to be reasonable; but what better ground can there be for finding that delay is reasonable \*than that it was the course which a prudent man would [\*41] have adopted.

In construing these policies the Courts are bound to consider what has been the mercantile usage. Thus, what is deviation is a

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question of usage. *Bond v. Nutt*, Cowp. 601, *Kingston v. Knibbs*, 1 Camp. 508, *n.* (10 R. R. 742 *n.*), and *Pelly v. The Royal Exchange Assurance Company*, 1 Burr. 341 (p. 30, *ante*), are to the same effect.

Sir G. Honyman, in support of the rule. — The ship is warranted to sail on her voyage on or before the 15th of August, and she must at that time be seaworthy for her whole voyage. No subsequent delay for the purpose of making her so is justifiable. In order to show that this was a necessary delay, the plaintiffs must show that it was to avoid some risk for which the underwriters were liable. *O'Reilly v. The Royal Exchange Assurance Company*, 4 Camp. 246 (16 R. R. 786). In *Lang v. Anderdon*, 3 B. & C. 495 (27 R. R. 412), it was said by Lord TENTERDEN that a warranty to sail is not complied with by the vessel's raising her anchor, getting under sail, and moving onwards, unless at the time of performance of these acts she has everything ready for the performance of the voyage, and such acts are done as the commencement of it, nothing remaining to be done afterwards. But even if a change in equipment was permissible, it ought to have been made at Arles and not at Marseilles, by which time would have been saved. And everything that was possible to be done at Lyons ought to have been done, otherwise the vessels might have left Lyons as mere hulls, and have taken months at Marseilles to complete their equipment. But the repair of the rudder and the supplying of extra tackle might have been as easily done at Lyons as at Marseilles. At any rate, it is clear that there was some unreasonable delay with reference to the *Papin No. 6*. She arrived at Marseilles a week earlier than the other two vessels, and, therefore, ought to have been ready for sea a week sooner. It is no excuse that she waited in order to sail in company with the other vessels, whether that was a prudent course or not. She was bound to sail on a certain day, and prosecute her voyage with despatch. If it was the desire of her owners that she should sail in company with the others, and such a course was prudent with reference to the safety of the vessel, there would have been no difficulty in inserting a clause to that effect in the policy. But there is nothing in the policy as it stands to warrant it. There is no evidence that the ships rendered each other any assistance on the voyage, and the increased risk of sailing at an advanced period of the year may far outweigh any possible advan-

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tage of sailing in company, as the event goes some way to prove.

WILLES, J.—In some respects this case presents features of novelty. If we had considered that there was any novelty in the principles of law applicable to the case, we should have taken time to consider; but as these are perfectly clear and familiar, there is no reason why we should not dispose of it at once. The peculiarity of this case consists chiefly in this: that the voyage, instead of being entirely on the high seas, commenced by navigation in a river under conditions different from those under which it was continued on the open sea. That leads us at once to the necessity of having regard to the course of business of persons engaged in this kind of navigation, and also, as must always be done in mercantile matters, of having regard to the course of convenience, where peculiar circumstances cause a deviation from the vessel's routine. It is useless to go through all the evidence on these points. It is enough to select some of the striking facts. It was proved satisfactorily, at the trial, that the vessel could not go down the river with her masts up; that she could, on this part of the voyage, make no use of her sails; and that she would require in the river an amount and class of pilotage quite unnecessary on the open sea. It was, therefore, necessary that she should complete her river navigation in a state and under circumstances different from those under which she would perform her sea voyage. It was impossible that she should start from Lyons in such a state as to be seaworthy for the whole voyage. It does not appear to me to be necessary to \* state the facts further for the [\* 42] purpose of showing that this was the case: it is obvious that it must be so. It seems to me, therefore, that if we were to read these policies in the sense that the vessels were to leave Lyons in a seaworthy condition for the whole voyage to Galatz, we should be adopting a construction which would render it impossible for the assured to derive any benefit from them whatever. This we ought not to do if there is any other possible mode of reading the document. Let us see, therefore, what the assured undertake by the policy. In the first place they undertake that the vessel shall be seaworthy. Now, that means different things on different parts of the voyage; a vessel that was seaworthy for the voyage down the Rhone, would not be seaworthy when she left Marseilles. And, indeed, there is an intervening part of the

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voyage, which gives rise to a third set of considerations, namely, that between Arles and Marseilles; you are here not in the river, but you are still not on the open sea. The question, therefore, arises, — inasmuch as change was necessary, where was the proper place to make it? That is a question of evidence. It seems to me that it would be unreasonable to require the vessels to stop at Arles, if they could arrive safely at Marseilles, and could do there more conveniently and more rapidly all that was necessary to prepare them for a sea voyage. And it must be recollect that under no circumstances could the vessels have avoided calling at Marseilles in order that they might be surveyed, as required by the law of 1791. That was unquestionably a lawful purpose for which to go to Marseilles, and no complaint can be made that the vessels stopped for lawful purposes. The objection, therefore, that has been taken that the vessels ought to have stopped at Arles, to make the necessary preparations for the sea voyage, resolves itself into a question of delay; and it seems to me, upon all the evidence, that so far as the choice lay between stopping at Arles and at Marseilles, there was no delay of which the underwriters could complain in stopping at Marseilles. It is, no doubt, true that if, on an analysis of the evidence, it should turn out, as was contended by Sir G. Honyman, that there was an unnecessary delay at Marseilles by doing certain things there which ought to have been done at Lyons, the defendants would succeed on that ground. Take, for instance, the case of the rudder; if it could be shown that the injury done to the rudder took place before the vessel left Lyons, and not in her voyage down the Rhone, that the injury could have been repaired at Lyons, and that the ship was delayed at Marseilles by reason of these repairs, then there would have been an unjustifiable delay, and the insurers would have had a good defence to the action. But no such evidence was given at the trial. It cannot be doubted that while the masts were being put in, and the other necessary changes were being made at Marseilles, there was ample time to repair the rudder without adding a single moment to the delay, and that there was, therefore, really no delay at all on this account. I also think that, if the defendants had intended to rest their defence on this ground, they ought to have requested that this point should be put specifically to the jury at the trial, which was not done; and that not having been done, the point is not now available to them.

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The question, then, simply comes back to this, whether such a case as distinct amounts of preparation being required for distinct portions of the voyage is recognised in the law of insurance? It ought to be so recognised if it arises either from necessity, under the peculiar circumstances of the voyage, or if the practice has been established with respect to any particular class of voyages by mercantile usage. Now, it is sufficient to refer to what was said by Lord WENSLEYDALE, in the case of *Biccard v. Shepherd*, 14 Moore's P. C. 471, to show that such a state of things has been recognised. That case differed considerably from this, but I refer to it as showing that such a doctrine exists in insurance law as that which I am now discussing. The case is one of the highest authority, as it is evident that the Judicial Committee felt great difficulty about it, and that it received great consideration at the hands of Lord WENSLEYDALE. What Lord WENSLEYDALE says is this (p. 491): "Some propositions in the doctrine of the implied warranty of seaworthiness, which forms a part of every contract of marine insurance on voyages (for to time policies it does not apply), are perfectly settled. They are laid down in the case of *Dixon v.*

\**Sadler*, 5 M. & W. 405, 9 L. J. (N. S.) Ex. 48 (p. 58, [\*43] *ante*), in which I gave the judgment in the Court of Exchequer, with the concurrence of my Brethren, founded on the principle laid down in several cases. There is an implied warranty in every insurance of a ship that the vessel shall be seaworthy; by which it is meant that she shall be in a fit state, as to repairs, equipment and crew, and in all other respects, to perform the voyage insured, and to encounter the ordinary perils at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and if the voyage be such as to require a different complement of men or state of equipment, in different parts of it, as if it were a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be, at each stage of the navigation in which the loss happens, properly manned and equipped for it." Lord WENSLEYDALE there contemplated a case of this very kind, and he laid down that it was sufficient if the warranty of seaworthiness were complied with at each stage of the navigation.

How, then, in dealing with a question of insurance, can it be said that a change may be made in the state of the vessel with

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respect to seaworthiness, and yet no time be allowed for making it? Is it reasonable to consider that as delay which, I will now assume, was contemplated by both parties when the policy was entered into? It is clear that if this change is admissible, a reasonable time must be allowed for making it. That was all that took place. There was no evidence that the vessel stayed at Marseilles longer than was necessary to make the change, if it was lawful for her to stop for that purpose at all. I have already said that I think it was lawful for her so to do, and I think that disposes of the question of seaworthiness, and of time, so far as it relates to delay and deviation after the vessels had started.

I now come to the question which arises under the clause contained in all the policies, "warranted to sail on or before the 15th of August, 1861." That is a question which requires some accurate consideration. It is settled law that under such a clause as this the vessel is bound to start within the time specified on her voyage to her port of destination, fully equipped in all respects. That was so expressly laid down by Lord ELLENBOROUGH in *Ridsdale v. Newnham*, 3 M. & S. 456 (16 R. R. 327). In that case the ship was loaded at Portneuf, which lies about thirty miles above Quebec, upon the river St. Lawrence. She left Portneuf within the time specified, sufficiently equipped for the voyage from thence to Quebec, but not for her sea voyage. She did not leave Quebec till after the day specified. It was held that the warranty had not been complied with, and the reason given by Lord ELLENBOROUGH is, that the dropping down from Portneuf to Quebec was only preparatory to her voyage, and that she did not commence her voyage till she left Quebec. The case of *Pittgrew v. Pringle*, 3 B. & Ad. 514, was somewhat similar. There the ship was insured in a society, one of the rules of which was that no vessel should sail for certain ports after the 1st of September; and there was another rule, that the time of clearing at the Custom-house should be deemed to be the time of sailing, provided the ship were then ready for sea. The ship was lying in the river, and was about to proceed in ballast to one of the ports within the prohibition. On the 28th of August the vessel was cleared at the Custom-house at the port of Sligo, within the limits of which port she was then lying, and she was then deficient in ballast, having only fifteen tons of ballast instead of fifty. It had been arranged, in consequence of the shallowness of the water over the

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bar at the entrance of Sligo harbour, that she should take the rest of her ballast on board when she got outside. This, however, owing to an accident, she failed to do before the 1st of September, so that she did not proceed on her voyage till after that day. It was held that she had not complied with the above regulations. These and a variety of similar cases are quoted in Phillips on Insurance, 3rd edit., p. 431; and the utmost effect of them is stated in the passage, in which he says: "When the insurance is from an inland port, with warranty to sail by a certain time, the vessel must have its cargo and crew on board, and its clearance, to be ready to proceed on the voyage without \* further delay [\*44] at any places that can be considered parts, or branches of, or appendages to, the port named, and auxiliary to its navigation, though this may require dropping down a river or navigating inland waters to a considerable distance." In none of those cases was there the necessity which exists here of dividing the voyage into two distinct parts, and the impossibility that the vessel should perform the first part in a state in which she would be seaworthy for the second. In none of those cases was the vessel seaworthy at the time when, as a matter of fact, the voyage commenced. In this case, looking to the peculiar construction which it is necessary to give to the words "warranted to sail" before a certain day, and the implied warranty that the vessels should start on their voyage in a fit state in which to perform it, I think that the vessels did, by leaving Lyons before the 15th of August, properly equipped for the river voyage, though not for the sea voyage, comply with the warranty. The same reasons which warranted Lord WENSLEYDALE in the case in the Privy Council, warrant us here in holding that the voyage may be divided into two portions for the purpose of considering what is the necessary state of the vessel with respect to preparation. And it would be altogether inconsistent to apply this doctrine to a simple warranty of seaworthiness, and to refuse to apply it to a warranty to sail before a particular day.

As to the vessel *Papin No. 6*, a somewhat different question arises. She left Lyons on the 24th of July, and arrived at Marseilles on the 29th. Now, though, as I have already said, it was not necessary to have her ready to proceed on her sea voyage by the 15th of August, but only within a reasonable time after her arrival at Marseilles, it was necessary to use all proper despatch

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in making the necessary preparations. Two of the vessels, the *Bouillon* and *Papin No. 1*, were completed ready for sea at Marseilles without any delay, and all three vessels actually set sail on the 23rd of August. It is clear, however, that by using despatch the *Papin No. 6* might have sailed before the 20th, and that her preparations were not carried on with the same rapidity as on board the other vessels. The explanation given was this: that it was considered advisable that her voyage should be delayed a few days in order that she might sail in company with the other two vessels; and there can be no doubt that she was kept back for that purpose. The question is, whether that was also a reasonable delay. No doubt, the question what was a reasonable delay at Marseilles must mainly depend on what was a reasonable time within which to make the necessary preparations for the sea voyage; but there may be also circumstances affecting the safety of the vessels which ought also to be taken into consideration. For instance, if the vessel were complete by the evening, the captain might be justified in waiting till the next morning; or, when the vessel was completed, there might be a gale of wind blowing, which would render some delay prudent. This Court would not say dogmatically that the captain must start the very moment the ship was ready, or lose the benefit of the policy. It is for the jury to say whether the further delay was reasonable. In this case they had the evidence before them of a French captain, who said that he should consider it a prudent course for the one vessel to wait for the other two, so that all might sail in company. It is true that he gave as his reason that he should be sorry to sail at all in such a vessel as this without company; but that does not affect his opinion as to the prudence of the course taken. I cannot say, therefore, that there was no evidence for the jury that a prudent man uninsured wou'd not have waited under similar circumstances; and as it was entirely a question for the jury, I do not think the verdict on that point ought to be disturbed. For these reasons, I am of opinion that the rule ought to be discharged.

BYLES, J.—I am of the same opinion. My Brother WILLES has gone into all the questions raised in this case so fully that it is unnecessary for me to add more than that I agree with every word of his judgment. There is only one point on which I wish to add anything, and that is with reference to the delay of the vessel *Papin No. 6* at Marseilles, in waiting for the other two. A good

## No. 58.—Gibson v. Small.—Rule.

deal of remark has been made upon the evidence of the French captain, but I think that a reasonable consideration for the safety of the lives of the crew is necessary and proper. I also think \*that the clause in each policy, which gives leave to [\*45] the vessel to tow or be towed, shows that the parties contemplated that the vessels would proceed to their destination in company with each other.<sup>1</sup>

*Rule discharged.*

## ENGLISH NOTES.

The same rule has been recognised as applying to the implied warranty in a charter-party in *Thin v. Richards* (C. A. 1892), 1892, 2 Q. B. 141, 62 L. J. Q. 39, 66 L. T. 584, 49 W. R. 617.

## AMERICAN NOTES.

In *Van Valkenburgh v. Astor M. Ins. Co.*, 1 Bosworth (N. Y. Super. Ct.), 61, where there was insurance on goods from New York by steamer to Chagres, thence across the Isthmus to Panama, and at and from thence by steamer to San Francisco, one Judge was of opinion that the implied warranty of seaworthiness attached only on the commencement of the voyage at New York, and another held that it attached at the commencement of each. Somewhat analogous to the principal case is *Treadwell v. Union Ins. Co.*, 6 Cowen (N. Y.), 270. In *Copeland v. N. E. M. Ins. Co.*, 2 Metcalf (Mass.), 444, SHAW, Ch. J., says substantially that if a long voyage consists of several stages, it is the owner's duty to fit the vessel for sea at each stage.

## No. 58.—GIBSON v. SMALL.

(H. L. 1853.)

## No. 59.—DUDGEON v. PEMBROKE.

(H. L. 1877.)

## RULE.

IN a time-policy there is no implied warranty of seaworthiness, either at the commencement of the voyage or at any other point of time.

<sup>1</sup> WILLIAMS, J., left the Court before the argument was concluded.

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No. 58.—Gibson v. Small, 4 H. L. Cas. 353, 354.

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**Gibson (Plaintiff in error) v. Small and others (Defendants in error).**

4 H. L. Cas. 353-424 (s. c. 1 C. L. R. 363; 17 Jur. 1131).

*Insurance. — Time-policy. — Implied Warranty of Seaworthiness.*

[353] By the law of England, in a time-policy effected on a vessel then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended to attach.

A policy of insurance was effected in London on the 27th of November, 1843, on a ship then abroad, "lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both days included." To a declaration for a total loss on the 14th October, 1843, by perils of the sea, the defendant pleaded that "ship was not, at the time of the commencement of the risk in the policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition to go to sea; but, on the contrary thereof, was wholly unseaworthy." It appeared in evidence that on the 24th of September, 1843, the ship was at sea, seriously damaged, and in that state it succeeded in making Madras in the course of the following day. The verdict found the plea to be proved in fact.

*Held* (affirming the judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench), that this plea did not afford a defence to the action, for that there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach.

In this case an action had been brought in the Court of [\*354] Queen's Bench by *Small and others v. Gibson*, on a policy \* of insurance effected on the 27th of November, 1843, by them, as agents for Antonio Hypolite Gigual, on the ship "the Susan, lost or not lost, in port or at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the said 25th day of September, 1843, and ending on the 24th day of September, in the year 1844, both days included." Gibson pleaded four pleas, of which the second alone is material: "That the said ship or vessel, in the said declaration mentioned, was not, at the time of the commencement of the said risk in the said policy of assurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, in the year of our Lord 1843, in the said declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea; but, on the contrary, was wholly unseaworthy." Verification. Replication, *de injuriâ*, and issue thereon.

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At the trial of the cause at the London sittings after Trinity Term, 1848, it appeared that, about the beginning of September, 1843, the ship sailed from Madras for the Mauritius, with 288 coolies on board; encountered very bad weather, and put into Trincomalee, which place the captain was ordered to quit or to go into quarantine, as the small-pox was reported to be on board his vessel. He preferred the former alternative, and determined to try to return to Madras, in order to get repaired. He encountered bad weather on the voyage, and the vessel became still more damaged, but he arrived at Madras on the 25th of September; so that on the day on which the risk was to attach, the vessel was at sea, seriously injured, and endeavouring to make a port to get repaired. The necessary repairs could not be effected at Madras, and the captain therefore tried to reach Coringa, but met other misfortunes of a similar sort to those before experienced, and was obliged \* to put into Masulipatam. [\*355] The coolies refused to stay on board any longer, the surveyors reported against the possibility of repairing the vessel, except at a very considerable expense, and finally it was sold, and the owners gave notice of abandonment.

The jury returned a verdict for the defendant, finding "that the said ship or vessel in the said declaration mentioned was not, at the time of the commencement of the said risk in the said policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary thereof, was at those times, and each of them respectively, wholly unseaworthy." A motion was afterwards made to enter judgment for the plaintiff *non obstante veredicto*, but the rule was discharged and judgment given for the defendants (16 Q. B. 128). A writ of error was then brought in the Exchequer Chamber, when the judgment of the Court of Queen's Bench was reversed, and judgment was given for the plaintiff *non obstante veredicto* (16 Q. B. 141). The case was then brought by writ of error to this House.

The Judges were summoned, and Lord Chief Baron POLLOCK, Mr. Baron PARKE, Mr. Baron ALDERSON, Mr. Justice MAULE, Mr. Justice ERLE, Mr. Baron PLATT, Mr. Justice WILLIAMS, Mr. Justice TALFOURD, and Mr. Baron MARTIN attended.

The case having been argued by the Attorney-General (Sir F.

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No. 58. — Gibson v. Small, 4 H. L. Cas. 355-396.

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Thesiger) and Mr. J. P. Wilde, for the plaintiff in error, and by Sir F. Kelly and Mr. Serjt. Shee (Mr. Unthank was with them), for the defendants in error:

[367] The LORD CHANCELLOR proposed the following questions to the Judges:—

1. Adverting to the record and proceedings in this case, is the policy subject to an implied condition or warranty that the ship was seaworthy?

2. If yea, then did the condition of seaworthiness mean that the ship was seaworthy at the time it commenced the voyage, or at the making of the insurance, or when the liability of the underwriters commenced, that is, on the 25th of September, 1843?

3. Are there any, and if any, what, qualifications in [\*368] \* regard to such seaworthiness in a case like this which would affect the rights of either party under the policy?

4. And, lastly, whether the plea is a valid plea in law in answer to the action?

Lord Chief Baron POLLOCK, on behalf of the Judges, requested time to answer these questions. The request was acceded to.

The Judges differed in opinion, the minority, Mr. Justice ERLE and Mr. Justice WILLIAMS, being of opinion that there was an implied warranty, and that the plea was good; Mr. Baron PLATT being of opinion that there was a warranty that at the inception of a voyage commenced during the term the vessel should be seaworthy; but that this warranty did not apply to the circumstances of the case, and so the plea was bad. The remaining six Judges delivered judgments to the effect that there was no implied warranty at all. As fairly representative of these, and the most important of them, it will be sufficient here to set forth the judgment of

[395] Mr. Baron PARKE.

The first three questions proposed by your Lordships, as well as the last, were under the consideration of my Brethren and myself, by whom the present case was decided in the Court of Exchequer Chamber; but as they were not necessary for the decision of the case in the Court below, we disclaimed deciding upon them, nor were they argued there so fully, nor so much deliberated upon, as if they had been essentially necessary to the decision of the case itself.

[\*396] \*As your Lordships have now proposed to us the first

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three questions in distinct terms, it is my duty to pronounce my opinion upon them, which I proceed to do, though not with quite so much confidence or satisfaction to myself as I should have done if they had been argued at the bar in the manner they would have been, if essentially necessary to the decision of the question in the cause. That question was simply whether the fourth plea is valid; and the only point involved in that question is, whether there is an implied condition in every policy of assurance for time, in the form of this policy, under all circumstances in which the ship shall be situated, that it should be seaworthy at the commencement of the term or the date of the policy. Unless there is, the plea is bad. I am of opinion that there is no warranty or implied condition that the ship was seaworthy at the commencement of the term; and, upon the best consideration I can give to the subject, I think I ought to advise your Lordships that there is none that the ship was seaworthy at any particular time; that there is, in fact, no warrant of seaworthiness at all.

The whole of the law upon this subject depends upon one question, whether there is any sufficiently distinct and clear authority in the common law for annexing any condition of this sort to a policy of assurance for time.

The policy is a written instrument, which contains a number of express stipulations, but none on the subject of seaworthiness: for the notion that it was involved in the term “good ship” in policies is, I think, put an end to, for the reason stated in the judgment in the Court of Exchequer Chamber in this case, and has been entirely abandoned in the argument at your Lordships’ bar.

If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the contract, and that either by the usage of trade or by \* the [\* 397] common law of the land; from the nature of the policy itself, there is no other way in which it can be added.

The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their term exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable.

This is explained in the case of *Hutton v. Warren*, 1 M & W.

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475. But in this case there is no evidence stated on the record of such usage; and none such can be supposed to exist, unless there is evidence of it.

Such a condition may, however, be annexed as a necessary incident by the common law. The simple question is, Does the common law annex any such incident? An examination of the authorities, judicial decisions, and *dicta*, and of text-writers on the common law, from which we derive our knowledge of that law, leaves us without any satisfactory proof that the same implied warranty, or condition as to seaworthiness at the commencement of the risk, which confessedly is annexed to voyage-policies, or any warranty or condition as to seaworthiness, is annexed to time-policies.

In the common law of England, to be collected from these sources, there is ample authority that a warranty, or condition of seaworthiness at the commencement of the risk, is implied in all voyage-policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself. So other conditions are implied; as, not to deviate from the usual course of the voyage, to commence it in a reasonable time,

[\* 398] to disclose all material circumstances,—and the non-  
[\* 398] performance of \*these conditions avoids the policy,

whether it arises from fraudulent motives or not. This is explained at length in the accurate report of the judgment of the Court of Exchequer Chamber in the Queen's Bench Reports, 16 Q. B. 158 (for, as elsewhere reported, it is full of errors), and the authorities there referred to, and they need not now be repeated.

It is undoubted law that there is an implied warranty with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it; or had been seaworthy for the voyage when the voyage insured had been commenced, if the insurance is on a vessel already at sea; which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of seaworthiness at the commencement of the risk; and this has led to the supposition that there is always such a warranty. It is also perfectly clear that, in our law, there is no other warranty of seaworthiness in a voyage-policy than that the ship is seaworthy at the commencement of the voyage. There is no warranty in the law of England that the vessel shall continue seaworthy after the voyage has

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commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament; none, on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage,—although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom \* imposed upon American underwriters; for in all [\* 399] these respects our law differs from the law of the United States, in which it is the acknowledged rule that the assured must not only have his vessel seaworthy at the commencement of his voyage, but keep it so, so far as depends upon himself, during its continuance; and the underwriters are discharged from any loss which is distinctly shown to have arisen from the negligence or misconduct of the assured, in not keeping the ship in a perfect state. The authorities are cited by Mr. Arnould in his excellent book on Insurance (I., s. 247, p. 666).

The only warranty, then, as to seaworthiness in a voyage-policy, recognized by our law, is, according to all the authorities, that the vessel was seaworthy at the commencement of the voyage. But it is equally clear that there is no satisfactory decision, *dictum* of a Judge, or authority of a text-writer, that there is any such warranty of seaworthiness at the commencement of the term in a time-policy.

The Court of Queen's Bench proceeded, in their judgment in this case, on two suppositions: first, that the opinion of all the lawyers in modern times was clear, that there was no difference between a time-policy and one for a particular voyage, as to the implied warranty of seaworthiness; and that the same point was settled by the case of *Sadler v. Dixon*, 8 M. & W. 895 (p. 63, *ante*), following that of *Hollingworth v. Broderick*, 7 Ad. & El. 40. The judgment of the Court of Exchequer Chamber states the grounds for holding that the Court of Queen's Bench was mistaken in both these respects.

As to the first, the Judges then present were not, nor am I now, aware of any such prevailing opinion in the profession; and as to the opinion of text-writers, the authorities cited in the judgment show that this question was a matter yet unsettled. Mr.

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[\* 400], Arnould, after stating (I., s. 154, p. 411) that a \* question has been raised whether the extent and meaning of the implied warranty is the same in a time as a voyage policy, states that the better opinion is, that it is, but that the question will afterwards be fully discussed by him; and subsequently (I., s. 248, p. 670) discusses it, and intimates his notion as to time-policies, that the implied warranty is that the ship should be seaworthy when it sails under the policy for the voyage or course of navigation on which it is contemplated to be employed during the term; and what that voyage is, is a matter of evidence. This is not the same proposition as that the vessel must be seaworthy at the moment that the term commences, wherever it may then be, but quite a different one. He refers for that position to the case of *Alexander v. Pratt*, which came on in the Court of Exchequer, 24th January, 1846, where a vessel was insured for twelve months from the date of its arrival at Sydney; in which the question was discussed whether, when the vessel sailed on the intended voyage from Sydney, it was not required to be seaworthy for that voyage. He says the Court intimated its opinion that the vessel should be seaworthy for the voyage then intended; but the pleadings did not raise the question, and the cause was sent down to a new trial, with power to amend them, in order to raise it; and the cause was settled. This case in effect decided nothing; and it was so little the subject of argument at the bar, that I have no note of it, though I have of all the cases of the least importance at that period.

Mr. Serjeant Marshall (Ins., Vol. 1, p 151) not having his attention directed to the distinction between time and other policies, lays it down that the ship insured must be seaworthy at the time of sailing, not at the commencement of the risk; and the late

Mr. Justice PARK, in his work on Insurance (p. 450) [\* 401] \* states the time of insurance to be the period at which the vessel was to be seaworthy,—certainly an inaccurate proposition, and probably not intended to be so understood, as one of the authorities cited by him refers to the commencement of the voyage, and the other is a mere illustration of Lord MANSFIELD's in *Carter v. Boehm*, 3 Burr. 1915 (13 R. C. 501), where the interest in a fort was insured for time, and his Lordship said that the utmost that could be contended for was, that the underwriter trusted to the fort being in the condition in which it ought to be, in like manner as it is taken for granted that a ship insured is seaworthy; but at what

time the fort ought to be in that state was quite immaterial upon the facts, as in the opinion of the Court it was so at the time of the commencement of the term insured, and at the time of making the policy the fort was certainly lost. So that Lord MANSFIELD never could have meant to say that seaworthiness was necessary at the time of the loss.

Mr. Phillips, an American author of repute, in his treatise on Assurance, Vol. 1, p. 328, does not appear to think this a settled point in America. He refers to the opinion of the American Chief Justice SHAW, who says that, whether the rule of seaworthiness would apply when the ship had been on a long voyage, was a matter of doubt, and, if it did, it must be understood with great latitude; and he cites *Paddock v. Franklin Insurance Co.*, 11 Pickering's Rep. 227.

So far, therefore, as relates to the opinion of the text-writers, the proposition in the judgment of the Court of Queen's Bench is by no means made out; nor is the judgment supported by any one of the authorities referred to as deciding the question.

In the first case, *Hollingworth v. Broderick*, 7 Ad. & El. 40, the plea was, that after the term commenced, and before the \* loss, the vessel became unseaworthy, and might have [\* 402] been repaired at a reasonable expense, and that the ship remained unseaworthy at the time of the loss; and the Court decided that plea to be insufficient, being of opinion that a state of unseaworthiness during the voyage could not be a defence, unless, at all events, it was shown to be the cause of the loss, if indeed that would make any difference (as it would not).

Nothing was decided as to there being any implied warranty in time-policies, as a condition precedent to the policy attaching, or as to the time to which that warranty relates. The only part of the case bearing upon the present question is the *dictum* of Mr. Justice PATTESON in the course of his judgment. But the learned Judge was evidently speaking with reference to that case, in which the question was, whether there was any implied condition as to keeping the vessel in repair after the term commenced; and if it meant more than that there was no difference between a time-policy and a voyage-policy in that respect, and that there was a warranty or implied condition of seaworthiness at the commencement of the term, it is of less weight, because that question was quite foreign to that case, and did not arise at all in it. Nor did

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the case of *Sadler v. Dixon*, 5 M. & W. 205, 8 M. & W. 895 (p. 63, *ante*), settle that point; on the contrary, the judgment of the Court of Exchequer expressly states the point to be unsettled; and it decided merely that the implied warranty was at least not more extensive than that on a policy on a voyage; and that if there was no contract for the conduct of the crew in one case there was none in the other. When this judgment of the Court of Exchequer was affirmed, Lord Chief Justice TINDAL used some expressions which were contended before us to amount to [\*403] an \*opinion that the implied warranty of seaworthiness was the same in a time and a voyage policy, and applied to the commencement of the risk. But it is clear from the context that no such position was meant to be positively laid down, but only that the obligation of the assured on a time-policy was, after the policy attached, not more extensive than that on a voyage-policy, and did not require the assured to keep the vessel in a seaworthy state. The period to which the warranty of seaworthiness attached was wholly immaterial in that case.

The only other case cited before your Lordships was that of *Hucks v. Thornton*, Holt N. P. 30 (17 R. R. 594). That was a decision of Lord Chief Justice GIBBS at Nisi Prius, in a trial on a time-policy, on a whaling voyage, with liberty of cruising for prize; and he held that it was enough to satisfy the implied warranty of seaworthiness if, at the commencement of the time, the ship had a crew fit for one of the purposes, though unfit for the other.

It may be inferred, from the fact of Chief Justice GIBBS leaving that case to the jury, that he thought that there was in a time-policy an implied warranty or condition of seaworthiness, of some sort, at the commencement of the term for which the ship was insured. But the facts may not have made it necessary for him to give that question much consideration, as the plaintiff was likely to succeed even if there was such a warranty; and at all events it was no more than a Nisi Prius opinion; and as the decision was in favour of the plaintiff, and the propriety of it could not be questioned by a motion for a new trial, it is of much less weight.

In this state of the *dicta* and decisions on the subject of warranties of seaworthiness on time-policies (and these are [\*404] \*all), it is impossible to say that they supply satisfactory

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proof that there is any warranty of seaworthiness at the time of the commencement of the term. The decisions distinctly show that there is none that the ship is to continue seaworthy for the term. In truth, there is only one *Nisi Prius* decision in support of the proposition that there is such a warranty as to the commencement of the term. From the course the cause took, it could not be afterwards questioned; and the *dicta* referred to are explained by the context, or are extra-judicial. It lies upon those who seek to add another condition to a written contract, not expressed, where there is no evidence of usage of trade, to show that the law implied it. These authorities are of themselves, in my judgment, quite inadequate for such a purpose.

If, however, precisely the same principle applied to both the case of a voyage and a time policy, if they were exactly analogous in this respect, less positive authority might be required; and it might be thought that these, at best slender authorities, would be sufficient. Perhaps even without them such a condition might be implied, if the cases were similar; but they certainly are not. In a voyage-policy, the owner of a ship has, generally speaking, the power to make the ship seaworthy at the commencement of the voyage. In the ordinary course of navigation he always does so for his own sake; he is bound to do so for the safety of his crew, and for the safety of the cargo placed on board; he contracts with every shipper of goods that he will do so. The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence the usual course being that the assured can and may secure the seaworthiness of the ship,—either directly, if he is the owner, or indirectly, if he is the shipper,—it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it.

\* It may happen indeed, in some cases, from the want of [\* 405] proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage, but the law cannot regard these exceptional cases "*ad ea quæ frequentius accident jura adaptantur*"; and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage-policies, that the assured impliedly

## No. 58. — Gibson v. Small, 4 H. L. Cas. 405, 406.

contracts to do that which he ought to do on and before the commencement of the voyage; that is, to make the ship seaworthy at the commencement of it, and in part, *quoad hoc*, in the preparation for it. The contract contained in the policy imposes on him no duties which were not incumbent on him before. But how different is, in general, the case of one who insures for a time? He does not necessarily know the position of his vessel at the commencement of the term; if the term commences whilst the vessel is absent from a port, he cannot, generally speaking, cause it thus to be repaired; and no care or expense of himself or agent could secure that object. The ship may have lost anchor, or sails, or rudder; part of the crew may have deserted, or be dead of malignant fever. All these deficiencies, generally speaking, are such that no care or expense could have prevented or cured. How unreasonable, then, would it be for the law to hold that there was in every case added to a policy, which is silent on the subject, a condition which, in most cases, it would be impossible for the assured to fulfil.

These considerations render a time-policy essentially different from one on a ship. They are powerful arguments against implying a condition of seaworthiness by a party who generally has

it not in his power to fulfil it; nor is it satisfactory to say [\* 406] that the condition ought to be implied in \*all cases

where it actually is in the power of the party to fulfil it, for the law usually acts by general rules, and the maxim which I have quoted is clearly applicable.

Nor is it an answer to say that a more liberal construction of the term "seaworthy" in time-policies might obviate this objection, and that a different degree of seaworthiness is sufficient for the completion of a voyage already begun, than would be necessary for the entire voyage; that a ship which was in the commencement of the voyage perfectly seaworthy in respect of the state of hull, equipment, and stores, would be still seaworthy for this purpose, though in the middle of the voyage, when the time-policy should attach, the hull had suffered by wear and tear, the stores had been diminished, or the equipment deteriorated; for it still might be reasonably capable of performing the rest of the voyage. Doubtless this is true; but any laxity of the term "seaworthy" would not provide for the cases of losses of the anchors, rudder, or masts, or sails, or crew, or of irreparable sea damage,

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after incurring which no vessel could, in the most loose interpretation of the term, be considered as seaworthy.

I therefore come to the conclusion, from these premises, that there is not, in the case of a time-policy, an implied warranty or condition that the vessel must be seaworthy at the commencement of the term insured. I feel no doubt that this condition cannot be implied. I am equally clear that there is no implied warranty or condition that the ship insured shall be seaworthy at the date of insurance. There is a total absence of authority for this, if I except the part I have already quoted from Mr. Justice PARK's book, and which is, for the reason above given, evidently an unintentional inaccuracy of expression. And, indeed, the expression in this policy, "lost or not lost," which means lost or not lost when the policy was effected, totally excludes all \* idea [\* 407] of an implied warranty or condition that the ship was then seaworthy.

Two other cases of implied warranty or condition of seaworthiness may be suggested in which there is more doubt. One, that the ship was seaworthy at the commencement of the voyage, of which the time insured by the time-policy was part; as, for instance, if the ship sailed on the 1st June, 1850, on a voyage from Liverpool to the East Indies and China and back, a voyage which might probably last two years, and the time-policy, being meant to cover part of that voyage, was from the 1st of June, 1850, to the 1st of June, 1851, would there be any implied warranty or condition that the ship was seaworthy when it sailed from Liverpool? Would there be any if the time-policy expressly stated on the face of it that the time was part of that voyage, as, for instance, that the ship was insured from the 1st June, 1850, to the 1st June, 1851, on a voyage from Liverpool to the East Indies and China and back? Upon this question I cannot answer your Lordships with so much confidence as upon the other. My opinion might possibly be qualified, or altered, by a more solemn argument, where those were the questions upon which the decision was to turn; but I now answer them by saying, that it seems to me that there is no warranty in either case, for this short reason, because I cannot find any satisfactory authority in the law of England for annexing such an implied condition or warranty to a written insurance, which *prima facie* contains all the terms upon which the parties contract, though there is much more rea-

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No. 58.—Gibson v. Small, 4 H. L. Cas. 407—415.

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son for implying such a contract than one of seaworthiness at the commencement of the term, inasmuch as it was competent, generally speaking, for the assured to secure the performance of such a condition, a condition of seaworthiness at the commencement of the voyage, and in the ordinary course of navigation he would do so.

[\* 408] \* The absence of these implied warranties will not practically be attended with the mischief which it is said they are calculated to prevent. In cases in which the assured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time-policy covers part, in an unseaworthy state, the insurance would be void on the ground of the concealment of a material circumstance, and this will prevent the frequency of such an occurrence; and in all cases in which the underwriter wishes to be secure against such a contingency, he may take care to provide for it in the policy by introducing a warranty of seaworthiness at the commencement of the risk or voyage, which, however, would lead to a diminution of the premium.

The answers to the first three questions will lead your Lordships to conclude that my answer to the last question is, that the plea is clearly bad. The meaning of the term "commencement of the risk," used in the plea, is clearly the commencement of the risk which the underwriters are to take on themselves, the commencement of their liability; that is, the commencement of the term of insurance. If there was no implied contract or condition of seaworthiness at the commencement of the risk or term (which is the same thing), there was none of seaworthiness on the 25th of September, and certainly none of seaworthiness at the date of the policy; for the policy is "lost or not lost." Therefore it is utterly immaterial whether the ship was seaworthy or unseaworthy at any of these periods, and the plea is clearly bad.

[415] Lord ST. LEONARDS (having stated the nature of the case, and the difference of opinion upon it among the Judges in the Courts below and in this House) said:—

The opinion of the majority of the Judges is that which I entertained at the close of the argument, and it has not been shaken by the arguments of the two learned Judges who supported the judgment of the Court of Queen's Bench. In a voyage-policy, where the contract shows the nature of the adventure, from which the intent of the parties may be collected, the law implies a considera-

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tion of seaworthiness to perform the voyage. This has long been a settled rule, \* but no such rule has ever pre- [\* 416] vailed in regard to time-policies. There being no such rule, I think your Lordships cannot imply a condition in this case, where there is nothing on the face of the contract to warrant it.

Assuming the ship to be on a voyage when the time insured in a time-policy begins, all analogy fails between the case of a voyage-policy and a time-policy; and the very argument in this case proves that seaworthiness is not an implied condition in a time-policy warranted by custom and allowed by law. In such a policy neither party can be supposed to know the state of the ship when the risk commenced, and therefore it will be unreasonable to imply a condition of seaworthiness at that period. In the case of a policy for a voyage the condition implied is, that the vessel is seaworthy at the commencement of the voyage, not that it shall continue so. If, therefore, a time-policy effected upon a ship then on a voyage should be held to be subject to an implied condition in analogy to the other case, it would seem to follow that the underwriter who undertook to indemnify the assured for the period named must take the risk of the state in which the ship is from the beginning of that period, if the ship should be then at sea. A voyage-policy would cover the voyage, and any unseaworthiness during the voyage could not affect the policy. A time-policy effected during the voyage, for a period beginning while the ship is on the voyage, should, I think, at all events be held to cast the risk on the underwriter just as he must have borne it at the period in question under a voyage-policy. The analogy could not be carried further if even the time-contract declared that the ship was then on a particular voyage.

If the assured was guilty of any fraud or concealment, that would of itself avoid the policy, and therefore the \* condition contended for in time-policies is not necessary [\* 417] to guard against fraud or concealment.

If the ship had been lost after the commencement of the risk, viz., the 25th of September, 1843, though that was before the date of the contract, the underwriter would have been liable by the terms of his contract. It is clear, therefore, that no condition of seaworthiness at the date of the contract can be implied. Such a condition, therefore, if to be implied, could, in this case, only be implied at the commencement of the voyage; but there was no

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allegation as to any unseaworthiness at the commencement of this particular voyage, and courts of justice must act upon a rule general in its application.

If, however, a ship was about to sail upon a particular voyage, and a time-policy was effected, instead of a policy on the intended voyage, as at present advised, I think that a condition could be implied that the ship was seaworthy at the commencement of the voyage. But that is not this case. Any supposed difficulty on the part of underwriters may readily be obviated by the insertion in time-policies of an express warranty of seaworthiness at the commencement of the risk. I do not trouble your Lordships with the state of the pleadings, because it is admitted that the contention of the plaintiff in error cannot be maintained unless there is an implied condition in every policy for time, like that in this case, wherever the ship may be, that it was seaworthy at the commencement of the risk on the date of the policy. No such condition can, I think, be implied; and therefore I advise your Lordships to affirm the judgment of the Court of Exchequer Chamber.

Lord CAMPBELL:—

My Lords, I entirely agree in the opinion of my noble and learned friend who presided on the woolsack when this [\* 418] \* case was argued at your Lordships' bar, that the defendant in error is entitled to our judgment. The allegations in the plea of want of seaworthiness, although proved to the satisfaction of the jury, do not appear to me to constitute a defence to the action. I do not proceed upon the literal meaning of the word "seaworthy" which was contended for. Without regard to its literal or primary meaning, I assume it to be now used and understood to state that the ship is in a condition, in all respects, to render it reasonably safe where it happens to be at any particular time referred to, whether in a dock, in a harbour, in a river, or traversing the ocean.

The question raised by this record is, whether upon a policy of insurance on a ship for time, in the form of that set out in this declaration, there is an implied condition that when the policy ought to attach and the risk to commence the ship shall be seaworthy, that is to say, in a proper state of repair and equipment with reference to the situation in which it may then happen to be? It is incumbent on the underwriter, who here denies his liability, to show that in every time-policy there is such a condition; for

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neither the declaration nor the plea discloses any facts from which the condition is to be implied in this case, if it is not to be implied universally.

There is no custom or usage of trade respecting time-policies, which we can take notice of, which affirms the existence of such an implied condition; and after an examination of all the authorities which have been cited on the subject, I think it quite clear that there is none to guide us to declare that such an implied condition does exist. The two decisions mainly relied upon, of *Sudler v. Dixon*, 5 M. & W. 405, 8 M. & W. 895 (p. 63, *ante*), and *Hollingworth v. Broderick*, 7 Ad. & El. 40, have no application to the \*question of seaworthiness under a time- [\*419] policy at the commencement of the risk; and some casual expressions which may have dropped in these cases from the learned Judges when this question was not at all under their consideration are entitled to no weight, nor do the American or continental jurists, on the present occasion, afford us any aid.

The underwriter is therefore driven to contend, that because in policies on ship "from" or "at and from" a specified port to another specified port, or back to the port of outfit (commonly called "voyage-policies"), there certainly is such an implied condition, the same condition is to be implied in policies from a particular day to a particular day (commonly called "time-policies"), without reference to the local situation of the ship when the risk commences or terminates.

With regard to voyage-policies, we have usage and authority establishing the implied condition as certainly as any point of insurance law. These being wanting as to the extension of the doctrine to time-policies, the reasoning must be, that, as far as this condition is concerned, the contract by time-policies rests on the same principles, and that no distinction can be made between them. The condition may have been implied in voyage-policies from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin, that this state must be supposed to be known to the shipowner, that he has in his power to put the ship into good repair before the voyage begins; that to prevent fraud, and to guard the safety of the crew and the cargo, this obligation ought to be cast upon him before he can be entitled to any indemnity in case of loss; and, above all, that this implied condition in voyage-policies is essentially con-

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ducive to the object of marine insurance by enabling the ship-owner, on payment of an adequate premium, and acting [\*420] with honesty and securing \* reasonable diligence, to be sure of full indemnity in case the ship should be lost or damaged during the voyage insured; but time-policies are usually effected when the ship is at a distance, the risk being very likely to commence when it is actually at sea. Under these circumstances is it at all likely that either party would contract with reference to the actual state of the ship at that time with respect to repairs and equipments? The shipowner probably knows as little upon this subject as the underwriter. Any information which he has received tending to show that the ship is in extraordinary peril he is bound to disclose, or the insurance effected by him is void; but is it reasonable to suppose that he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing? We must further consider that this condition, in many cases, he may have no power to perform. Above all, if this condition was implied in time-policies, their object might often be defeated, and the shipowner, acting with all diligence, and with the most perfect good faith, might altogether lose the indemnity for which he had bargained.

Take as an example this policy, which is on the ship *Susan*, from the 25th of September, 1843, to the 24th of September, 1844.

This vessel may have been employed on the South Sea fishery. It may have sailed from an island in the beginning of September, 1843, in all respects in a seaworthy state, but before the 25th day of that month may have encountered a gale of wind in which the sails may have been carried away, and other damage may have been sustained, and the master may have died of a malignant fever; but the ship touches at another island on the 26th of September, is completely re-equipped, takes on board a new master of com-

[\*421] petent skill, and prosecutes the adventure. \* Afterwards, and before the 24th of September, 1844, the ship may be crushed between two icebergs. For anything that appears on the record, such may have been the history of the *Susan*; and these facts are consistent with all the allegations in the declaration and in the plea. On this hypothesis the owner could not be indemnified, because the ship was not seaworthy when the risk was to com-

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mence, namely, on the 25th of September, 1843. If there is a condition — an implied condition — that the ship must then be seaworthy, the policy neither attached then nor at any subsequent time, and the owner's only remedy would be to recover back the premium he had paid to the underwriters. Thus your Lordships are called upon to imply a condition which the parties could not have contemplated, which the assured had no power to perform and which would effectually defeat the object of the contract. If the loss is caused by any culpable negligence of the shipowner, that may be a defence to the underwriter; but if the shipowner acts with good faith and reasonable diligence, it is surely much more according to the principles of insurance laws, and of common sense, that the risk of the ship not being seaworthy when the liability of the underwriter ought to begin, should be cast upon him, who can easily indemnify himself by demanding an adequate premium for undertaking it.

The only consideration pointed out for extending the implied condition of seaworthiness to time-policies, which made any impression upon me, is that it does extend to voyage-policies on goods, although the assured can have no control over the repairs or equipment of the ship. But between the assured on goods and the underwriter there is the shipowner, who must be considered the agent of the assured, and he does undertake that the ship shall be tight, staunch, and strong, and every way fitted for the voyage. If this undertaking is broken, the merchant has no remedy against \* the underwriter, but he obtains [\*422] a full indemnity by suing the shipowner, and thus, either with the shipowner or the underwriter, the merchant is secure; so that the implied condition in his policy in no respect interferes with the object of insurance or with the interests of commerce.

If your Lordships shall be pleased, on the motion of my noble and learned friend, to affirm the judgment of the Court of Exchequer Chamber in this case, it will be definitely established that, by the law of England, in a time-policy such as this, no special circumstances being stated in the declaration, or the plea respecting the situation or employment of the ship, there is not an implied condition that the ship should be seaworthy on the day when the policy ought to attach.

The other questions which were debated at the bar, and which were propounded to Her Majesty's Judges, must be open for judicial

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consideration when they arise; but as your Lordships considered it expedient, for general information and for the advantage of the commercial world, that opinions should be given upon this very important subject, although they would not be binding, I think it right to say that, after great deliberation, I agree with those Judges who think that in a time-policy there is no implied condition whatever as to seaworthiness. I never for a moment could concur in the notion that there was an implied warranty that the ship was seaworthy when it sailed on the voyage during which the policy attached. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and being wholly unsanctioned by usage or by judicial authority, would be legislating instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for in fishing adventures, and where [\*423] ships are \* employed for years in trading in distant regions from port to port, the instances in which time-policies are chiefly resorted to, there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit.

I have hesitated more upon the question whether, when a time-policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule that in time-policies there is no implied warranty of seaworthiness, and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no instance of an implied condition of seaworthiness in any time-policy, and that the general rule is against such a condition, this would be a gratuitous and Judge-made exception to the rule. I think it more expedient that the rule should remain without any exception, and, as at present advised, I should decide against the implied condition in all cases of time-policies. There is a broad distinction which may always be observed between time-policies and voyage-policies; but when you come to subdivide time-policies into such where the ship is in a British port and where the ship is abroad, and still more if the residence of the shipowner is to be inquired

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into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable that in commercial transactions there should be plain rules to go by, without qualification or exception. Marine insurance has been found most beneficial, as hitherto regulated, and I am afraid of injuring \* it by new refinements. I should be [\* 424] glad, therefore, that it should be understood, according to my present impression of the law, that there is in all voyage-policies, but that there is not in any time-policies, framed in the usual terms, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce, and when any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I offer with the greatest diffidence, after what has fallen from my noble and learned friend, for whose opinion, on all subjects within the whole range of the law of England, I entertain the most sincere respect. I am glad to think that one important question of insurance law is now finally settled.

*Judgment of the Exchequer Chamber affirmed with costs.*  
Lords' Journals, June 3, 1853.

**Dudgeon v. Pembroke.**

2 App. Cas. 284—300 (s. c. 46 L. J. Ex. 409; 36 L. T. 382; 25 W. R. 499).

*Time-policy. — Warranty of Seaworthiness. — Perils insured against.* [284]

A policy of insurance was effected on ship from the 22nd of January, 1872, to the 23rd of January, 1873, both inclusive. These words were written in on a printed form, which also contained, in print, the words *at and from*, and *for this present voyage*, and other similar words which were commonly found in the forms of a voyage-policy, and which had not been erased or struck through.

*Held*, that the policy was really a time-policy, and its character was not affected by the printed words thus negligently left in the form.

In a time-policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy. *Gibson v. Small*, 4 H. L. C. 353, supplemented by *Thompson v. Hopper*, 6 El. & Bl. 172, and *Fawcett v. Sarsfield*, 6 El. & Bl. 192, declared to have set at rest all controversies on this subject.

If a shipowner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover.

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No. 59.—Dudgeon v. Pembroke, 2 App. Cas. 284, 285.

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A time-policy was effected on an iron steamer, the *Frances*, of 705 tons burden, then lying in the yard of its owner, a shipwright. It had been put under repair, and it was stated in evidence that there had not been any stint placed upon the repairs, and that the marine engineer who superintended the repairs, and the workmen who executed them, believed them to be completely satisfactory. It was expressly found that if the ship was unseaworthy, the assured was ignorant of the fact. The ship went with nothing but a deck cargo of iron machinery from London to Gothenburg, made more water on the voyage than could have been expected from the state of the weather, ceased to do so on getting into harbour, was examined, and its condition on the voyage could not be accounted for; and in a few days afterwards took on board a cargo of oats and 380 tons of iron, and a deck loading of timber; started from Gothenburg, encountered in the open sea very bad weather which put out the fires, ran for the port of Hull, could not make the port, ran ashore, and after some time was broken up and became a total wreck.

*Held*, that these facts showed a loss by perils insured against,—the perils of the sea,—and that the assured was entitled to recover as for a total loss.

A loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy.

In this case an action had been brought upon a policy of insurance on the iron steamer *Frances*. The policy was effected [\* 285] for the \* sum of £5800 on ship valued at £8000 and machinery at £4000. The policy stated that the assured

"caused themselves to be insured, lost or not lost, at and from , for and during the space of twelve calendar months, commencing on the 24th of January, 1872, and ending on the 23rd of January, 1873, both days inclusive, in port and at sea, in dock and on way, at all times, in all places, and on all occasions and services, . . . upon any kind of goods and merchandises, and also upon the body, tackle, &c., of and in the good ship or vessel called the *Frances* (S.) whereof is master for this present voyage

, or whosoever else shall go, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship *as above*, &c., . . . and further until the said ship shall be *arrived at* *as above*, until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged. . . . Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us *in this present voyage*, they are *of the seas*, &c., *and of all other perils, losses, and misfortunes* that shall

No. 59.—*Dudgeon v. Pembroke*, 2 App. Cas. 285, 286.

come to the hurt, &c., of the goods and merchandises and ship, &c., or any part thereof.”<sup>1</sup>

The *Frances* was an iron screw steamer of 705 tons burden, which had been built at Amsterdam, in 1858, and launched in 1859, for Spanish owners (under the name of the *Paris*), and was stated to have been originally constructed of good iron. It was proved to have been lying in 1867–1868 in the harbour of Cadiz, unemployed, for about eighteen months. The plaintiff was a shipwright at Millwall, and in 1871 the *Paris*, then lying at Birkenhead and being offered for sale, he contracted with the Spanish owners to build them a new vessel and to take their vessel in part payment. The vessel was, for the purpose of this arrangement, valued at £4000. It was then, as its boilers were not in good condition, towed round to Millwall. At the time when this transaction took place the plaintiff was the owner of two steamers plying between London and Gothenburg for goods and passengers, but one of them broke down, and the appellant \* re- [\* 286] solved to repair the *Paris*, and run it on the Gothenburg line. Its name was then changed to the *Frances*. He accordingly put the vessel into a dry-dock at Millwall, where it underwent all the repairs that were deemed to be required; and in the evidence given at the trial it was stated that there was no stint whatever as to the amount of the repairs, and that the workmen, and the marine surveyor and engineer, believed that the ship was made seaworthy. Before the *Frances* left London, a surveyor from the Board of Trade surveyed the outside of the ship, but for want of time did not survey the inside of it, and therefore it did not obtain a passenger certificate. It sailed for Gothenburg on the 3rd of February, 1872, without one passenger. It had then some machinery on deck, but no other cargo, and was stated to be, consequently, somewhat crank. On its voyage more water was observed in it than could be accounted for by the state of the weather, but it arrived safely at Gothenburg on the 7th of February, and on getting into harbour the leakage ceased. On examination there by carpenters, no cause for making so much water during the voyage could be discovered. On the 11th of February the *Frances*, having taken on board a cargo of oats and 180 tons

<sup>1</sup> The words printed in italics were those referred to in the Exchequer Chamber by Lord COLERIDGE, as showing that the policy bore the character of a voyage policy.

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No. 59.—*Dudgeon v. Pembroke*, 2 App. Cas. 286, 287.

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of iron, together with a deck cargo of deals, left Gothenburg for London. On the morning of the 12th of February, the ship being then in the open sea, the wind became very strong with a heavy rolling sea, and the ship laboured much, and a sail was put over the stokehole to prevent the sea from getting into the fires. The precaution did not answer; and in sixteen hours the fires were put out. Some of the wood forming the deck cargo was used for relighting the fires, and some was thrown or was washed overboard. After about twelve hours pumping, the pumps got choked with the oats, and all hands were employed in baling the ship. Evidence was given, which did not appear to be denied, to show that the screw tunnel was not in proper order, and that if it had been, the pumps could not have got choked as they did. On the night of the 14th of February endeavours were made to get the ship into Hull, but being waterlogged it did not readily answer the helm, and went ashore under Didlington Heights, upon the coast of Yorkshire, and finally went to pieces.

This action was then brought. The declaration contained a \*count on the policy as for a total loss and the common money counts. To the first count the defendant pleaded: 1. Denial of the insurance. 2. Denial of the plaintiff's interest. 3. Denial of the loss by perils insured against. 4. Misrepresentation. 5. Concealment. 6. That after the making of the policy the plaintiff, well knowing that the ship was unseaworthy, and without any justifiable cause, sent it to sea in such unseaworthy condition, and that the loss was occasioned thereby. 7. That the voyage was illegal by reason of the ship having sailed with passengers without a passengers' certificate, and that the policy was effected to cover the illegal voyage. As to the money counts, never indebted. Issue on all the pleas.

The cause was tried before Mr. Justice BLACKBURN and a special jury at the London sittings after Trinity Term, 1873, when the learned Judge left seven questions to the jury, which, and the answers, were the following: 1. Was the broker's representation at the time of making the insurance correct? — Yes. 2. Was it represented that the vessel was to carry passengers, and therefore that it had been surveyed by the Board of Trade? — No. 3. Was there concealment of any matter materially affecting the insurance? — No. 4. Was the fact that the ship had not been surveyed for carrying passengers material? — No. 5. Was the

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vessel seaworthy when it started? — The jurymen could not agree. 6. If not, was that known to the plaintiff? — No. 7. Was that unseaworthiness the cause of the loss? — The jurymen could not agree. The learned Judge directed the verdict to be entered for the plaintiff, with leave to move. A rule was obtained to set aside the verdict on the sixth plea, on the ground that the findings of the jury did not warrant the entry of the verdict, and that as to the third plea there was no finding to warrant the entry of such verdict. The rule also called on the plaintiff to show cause why a verdict should not be entered for the defendant, or a new trial be granted, on the ground that the findings were against the weight of evidence, and were inconsistent and incomplete. On the 6th of July, 1874, the Court of Queen's Bench gave judgment discharging the rule. (L. R. 9 Q. B. 581.)

This decision was, on appeal, reversed in the Exchequer Chamber, \* the majority of the Judges there being of opinion that the answers given upon the third and sixth issues did not properly dispose of the case, and that therefore there ought to be a new trial. (1 Q. B. D. 96.) This appeal was then brought.

Mr. Milward, Q. C., and Mr. A. L. Smith, for the appellant:—

When the principle of law that ought to govern this case is properly considered there can be no doubt that all the issues were disposed of, and that the verdict was rightly entered for the plaintiff.

There is no warranty of seaworthiness in a time-policy on ship. In a voyage-policy it is otherwise. This was a time-policy, and certain expressions used in it, though relied on in the judgment of Lord COLERIDGE in the Exchequer Chamber as altering its character, had no such effect.

The question has really been decided by the case of *Thompson v. Hopper*, 6 El. & Bl. 172, which followed the decision of this House in *Gibson v. Small*, 4 H. L. C. 353 (p. 86, ante). *Fawcett v. Sarsfield*, 6 El. & Bl. 192, and *Jenkins v. Heycock*, 8 Moo. P. C. 351, proceeded on the same principle.

By these authorities the law may be considered as definitely settled. The only difficulty that could exist arose from the applicability to the particular findings here of the principle involved in those decisions. The jurors could not agree whether at the time of effecting the policy the ship was or was not seaworthy.

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nor could they agree whether unseaworthiness was the cause of the loss. But this was a time-policy, and it became immaterial to consider these questions, for a time-policy involved no warranty of seaworthiness. Going out of the policy, and referring only to the general question whether the plaintiff had sent the ship to sea knowing that it was not seaworthy, so that he might be said to have occasioned his own loss, the jurymen answered distinctly that if the vessel was unseaworthy, which they could not agree to find, at all events he did not know of its being so. The material facts were therefore found in favour of the plaintiff, and consequently the verdict was properly entered in his favour.

[\* 289] \* Even if, independently of the rule of law as to a time-policy, the owner of a ship was bound to send it to sea in a state fit to encounter the ordinary dangers of a voyage, it was clear that he had done so here. The evidence showed that proper repairs had been ordered and executed, and the vessel made the voyage to Gothenburg in safety, and there could be no doubt that it was stress of weather and the perils of the sea that made it run ashore on its return voyage.

The cases relied on by the other side in the Court below (1 Q. B. D. 96), where the obligation of sending a ship to sea in a seaworthy condition was insisted on, were those of voyage-policies, which had nothing to do with the present case. *Douglas v. Seagull*, 4 Dow, 269 (16 R. R. 69), was the case of a voyage-policy, and the observations there made by Lord ELDON (4 Dow, at p. 276) were strictly confined to the case which he was then considering. The facts here showed that the loss was one which arose immediately from the perils of the sea, and would have been sufficient to fix liability on the defendant even if this had been a voyage-policy. *Walker v. Maitland*, 5 B. & Ald. 171 (24 R. R. 320); *Ionides v. Universal Marine Assurance*, 14 C. B. (N. S.) 259, 32 L. J. C. P. 170; *Bondrett v. Hentigg*, Holt N. P. 149 (17 R. R. 625); *Montoya v. The London Assurance Company*, 6 Ex. 451.

Mr. C. P. Butt, Q. C. (Mr. Cohen, Q. C., was with him), for the respondent:—

Whatever difficulty exists in this case as to the entry of the verdict, has arisen from the answer of the jurors to the latter part of the sixth question. But that really was immaterial.

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The plea on which it was founded was quite sufficient to defeat the claim of the plaintiff, without reference to that part of it which declared his knowledge of the unseaworthiness of the vessel. If the ship was unseaworthy and the plaintiff sent it to sea in that condition, and the loss was occasioned thereby, the plea was a good answer to the action; the averment of the *scinter* was unnecessary. If the ship went to sea without being fit to encounter the ordinary risks of going to sea, not the extraordinary risks of storms, for the \*consequences of which the insurer [\*290] alone made himself answerable, the assured could not recover. A policy of insurance was only a contract of indemnity against risks which could not be foreseen, or by ordinary care be provided against. If a vessel could not sail over a smooth sea without making water at such a rate as to threaten danger, such a vessel was not fit to be sent to sea, and was not a proper subject of insurance. It was not necessary to aver that the vessel was wilfully sent to sea in such a condition. Such an averment might be necessary to bring a man within the penal provisions of the 11th section of the 34 & 35 Vict., c. 110, but it was not necessary for the purpose of answering a claim upon a policy of insurance. It was not, therefore, necessary to put to the jury the question of knowledge, and the finding that if the vessel was unseaworthy the plaintiff was ignorant of it, did not affect the case. The real questions for the jury were, Was the vessel unseaworthy? and, if so, was that unseaworthiness the cause of the loss? On those questions, which were fairly raised by the third and the sixth pleas, the jurymen had been unable to agree. No verdict, therefore, was given upon them, and consequently there was no verdict to justify the entry of judgment. The absence of any finding could not justify the entry of a judgment as on a finding for the plaintiff. Upon this point the case of *Thompson v. Hopper*, 6 El. & Bl. 172, was really a case in favour of the defendant, for it showed that the fact of sending a ship to sea in an improper state—in other words, in a condition not fit to encounter ordinary sea risks—was a good answer to a claim by the assured, if it appeared that by reason of the premises the ship was wrecked. That was shown here by the plea, and that *pléa* was really made out by the evidence, and ought so to have been found by the jury; and the want of a finding on that matter was good ground for a new trial. And the case of *Fawcett v. Sarsfield*, 6 El. & Bl. 192, established

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even more strongly the same proposition. That was a time-policy, and it was there held that a ship sent to sea not fit to perform the particular voyage, and which was therefore, without encountering any but the ordinary risks of navigation, compelled to put into port for repair, was not to be treated as a vessel the repairs

of which were to be thrown on the underwriter. And [\*291] that was held though it was \* found as a fact, by the arbitrator,

that the owner did not know that such was the state of the vessel when he sent it to sea. The principle was adopted in *MERCHANTS' TRADING COMPANY v. UNIVERSAL MARINE ASSURANCE COMPANY*, 2 Mar. Cas. 431. The allegation of knowledge, therefore, in the sixth plea was immaterial, and ought not to have been left to the jury; but the other part of the plea was most material, and not having been answered in one way or the other by the jury, must be made the subject of another inquiry.

Then as to the supposed rule that there was not, in the case of a time-policy, an implied warranty of seaworthiness. No case had yet laid down any such rule. The case of *Gibson v. Small*, 4 H. L. C. 353 (p. 86, *ante*), did not decide the question one way or the other. It really only settled that, under such circumstances as existed there, no warranty of seaworthiness could be implied. But the vessel there was in a distant part of the world at the moment the policy was executed. Here, on the contrary, when the policy was entered into the ship was in the shipyard of the plaintiff himself, and he had the amplest means of knowing whether the vessel was seaworthy or not. The exemption from warranty of seaworthiness in a time-policy might well apply to a policy effected in England when the ship was in a distant port, but could not properly be applied when the vessel was in the port where the owner resided,—nay more, in his own dockyard. And to hold that, under such circumstances, a warranty of seaworthiness was implied, would not entail the consequences adverted to in some of the judgments in the Court below, but would be of advantage in preventing negligence and even fraud in such cases; and such was the opinion of Lord ELDON in *Douglas v. Scoughall*, 4 Dow, at p. 276 and his observation in *Wilkie v. Geddes*, 3 Dow, at p. 59, that in every contract of insurance there was an implied warranty of seaworthiness at the commencement of the voyage, though made in the case of a voyage-policy, was not intended to be restricted to voyage-policies alone. And Lord

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REDESDALE there expressly adopted those observations. It is plain that Lord ST. LEONARDS, while admitting, in *Gibson v. Small*, 4 H. L. C., at p. 417 (p. 100, *ante*), that a warranty of seaworthiness was not implied in a time-policy \* effected while [\* 292] the vessel was at sea, thought that it ought to be implied while the vessel was in a place where its condition was known to the assured. And Lord CAMPBELL himself in that very case, 4 H. L. C., at 423 (p. 104, *ante*), showed an inclination towards the same opinion.

The cases of *Bondrett v. Hentigg*, Holt's N. P. 149 (17 R. R. 625), and *Montoya v. The London Assurance Company*, 6 Ex. 451, showed, no doubt, that when the sea had utterly disabled the vessel, the injuries that afterwards happened to the goods, the subject of insurance, might be treated as losses occasioned by the perils of the sea; but here the question related to what was the cause by which the vessel had been so disabled. That question was, whether any injury would have occurred to the *Frances* from perils of the sea, if the vessel had been in a state fit to encounter ordinary sea risks.

The real substantive questions for the jury were whether the vessel was in a fit state to be sent to sea, and whether the loss had not arisen from its unfitness; and these questions not being answered, the Court below had done rightly in directing a new trial.

Mr. A. L. Smith, in reply:—

There was no warranty of seaworthiness in a time-policy, and the question of unfitness to go to sea could only arise where there existed knowledge of unfitness, or fraud was imputed. Here the existence of knowledge was distinctly negatived by the finding.

Lord PENZANCE:—

In this case, my Lords, the action was brought by the appellant upon a policy of insurance by which the steamship *Frances* was insured for a year for the sum of £5800, the ship being valued at £8000, and the machinery at £4000. Several pleas were pleaded by the underwriter, the present respondent. The cause was tried, and several questions were eventually put to the jury by the learned Judge, who, upon the answers of the jury, directed the verdict to be entered for the plaintiff. A rule was obtained to set aside this verdict for a new trial, or to enter the verdict for the defendant on the third plea. This rule was discharged \* after argument by the Court of Queen's Bench, [\* 293]

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and an appeal was then had to the Court of Exchequer Chamber upon a special case stated by the parties. The result of this appeal was, that the judgment of the Queen's Bench was reversed and a new trial granted. It is against this reversal that the appellant has appealed to your Lordships' House; and the questions raised in the case, though not numerous, are of extreme importance in the administration of the law of marine insurance.

My Lords, the policy in this case is a time and not a voyage policy, and not only so, but an ordinary time-policy. There can I apprehend, be no doubt upon that point. It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less, or something more, than a time-policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in Courts of law, to permit of any such conclusion.

The policy, then, being a time-policy, the first question raised for your Lordships' determination is, whether the law implies in such a contract any warranty that the vessel should be seaworthy at any period of the risk, and if so, at what period or periods.

My Lords, this is no new question. It was raised in the case of *Gibson v. Small*, 4 H. L. C. 353 (p. 86, *ante*), which was determined by your Lordships' House in the year 1854, and has been the subject of more than one subsequent decision. I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider that the case of *Gibson v. Small*, supplemented as it was by the two cases of *Thompson v. Hopper*, 6 El. & Bl. 172, and *Fawcett v. Sarsfield*, 6 El. & Bl. 192, must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special

stipulations in the contract, infer in the case of a time-[\*294] policy any warranty that the vessel at \*any particular time shall have been seaworthy. In pronouncing the judgment of the majority of the Court in the latter case, Lord CAMPBELL said, "For the reasons which I gave in the case of *Gibson v. Small*, and which I have given in the case of *Thompson v.*

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*Hopper*, I think there is no implied warranty of seaworthiness in any time policy."

From that time, upwards of twenty years ago, to the present, these decisions have been acted upon and submitted to, and thousands of time-policies have been effected and millions in losses adjusted under them; and whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be, as a matter of public policy and concern, that some such obligation of keeping his vessel, as far as it is within his power, seaworthy, should be cast on a shipowner, the law must, I submit to your Lordships, be considered as settled by these decisions, and any change made in it must be by legislative authority alone.

It was next contended that the vessel in this case was not lost by "perils of the sea," and that some question ought to have been put to the jury by the learned Judge upon this subject. The circumstances of the vessel's loss are detailed in the special case. It is only necessary to quote a few sentences of it: "The *Frances* laboured heavily, and began to make water to such an extent that in sixteen hours the fires were extinguished. A portion of the deals which formed the deck cargo was used for relighting the fires, and the rest was thrown or washed overboard. After about twelve hours pumping the pumps got choked with the oats, and all hands had to be employed in bailing the ship." There was evidence given by the defendants that had the screw tunnel been in proper order, the pumps would not have got choked as they did. "On the night of the 14th of February those on board the *Frances*, having sighted the Spurn Lights, endeavoured to get her into Hull; the ship at the time being waterlogged, did not readily answer her helm. Partly from this, and partly from the thickness of the weather, which at the time was very dense, on the following morning, at about 5 A. M., the ship having been in a state of distress since the morning of the 12th of February, went \* ashore under Dillington Heights, upon the coast of [\* 295] Yorkshire. One of the boats was swamped, but the crew were all saved by a smack. Part of the cargo was afterwards saved; but the vessel could not be got off, and subsequently broke in two, and, finally, after some months, went completely to pieces."

These facts require no argument. If ever a vessel was "lost by perils of the sea," understanding those words in the sense which

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the Courts of this country have uniformly ascribed to them, this vessel undoubtedly was so; and the real question intended to be raised, therefore, is, whether a vessel not strong enough to resist the perils of the sea (in another word, unseaworthy) can be properly said to be "lost by perils of the sea," when it is clear that by the force of the winds and waves it went ashore, and finally "broke up and went to pieces." The question, therefore, is one of law and not of fact, and the learned Judge was quite justified in entering the verdict as he did, without asking the jury any further question as to the loss, about which there was no fact in dispute, subject to determination of the question of law so raised.

In discussing such a question it must be assumed (as it was admitted by the appellant that it should be, for the sake of argument) that the vessel was not seaworthy, and that its want of seaworthiness caused it to be unable to encounter successfully the perils of the sea, and so to perish. The question, therefore, is in substance the same as that raised by the sixth plea, or rather so much of it as the jury found to be proved; namely, that the vessel "sailed from London in a wholly unseaworthy condition in the voyage on which she was lost," and that the ship "was lost, as alleged, by reason of such unseaworthiness." For this plea must be understood to mean, not that the vessel did not perish immediately by the action of the winds and waves (if it did, it was certainly not sustained by the facts), but that the loss by these perils of the sea was brought about by the vessel's unseaworthiness.

It will at once occur to your Lordships, upon the raising of such a question, that it applies as much and as fully to a voyage-policy as to a time-policy. If a loss proximately caused by the sea, but

[\* 296] more remotely and substantially brought about by the con-

dition \* of the ship, is a loss for which the underwriters are not liable, then quite independently of the warranty of seaworthiness, which applies only to the commencement of the risk (in its several "gradations," as Mr. Justice ERLE in *Thompson v. Hopper*, 6 El. & Bl. 172, at p. 181, called them), the underwriters would be at liberty in every case of a voyage-policy to raise and litigate the question whether, at the time the loss happened, the vessel was, by reason of any insufficiency at the time of last leaving a port where it might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability.

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If such be the law, my Lords, the underwriters have been signally supine in availing themselves of it. For there is no case that I am aware of, except those to which I have referred, in which anything like such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine.

The case of *Fawcett v. Sarsfield*, 6 El. & Bl. 192, was relied upon at the bar, but that was a case of partial loss, in which the question was whether the underwriters were liable for certain repairs, and the Court held that the arbitrator had found "that the necessity for repairs did not arise from any peril insured against, but from the vice of the subject of insurance."

In the total absence, then, of all authority, and in the fact that this defence is a new one, I find sufficient reason for advising your Lordships not, now for the first time, to sanction a doctrine which would entirely alter the hitherto accepted obligations between underwriter and assured.

It was said by one of the learned Judges in the Exchequer Chamber that "the unseaworthiness of the ship at the commencement of the voyage, which really causes the loss, is a fact, the consequences of which are imputable to the assured, and were to be borne by him, and not the underwriters." But the question, as it seems to me, is not what losses ought in the abstract to be borne by the assured as being "imputable" to him or his agents on the one hand, or by the underwriters as being caused by the elements on the other hand, but what losses they have mutually agreed

\* should be borne by the underwriters in return for the premium they have received. These losses are in the contract of insurance, amongst others, declared to be all "losses by perils of the sea." A long course of decisions in the Courts of this country has established that *causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it.

It is, I conceive, far too late for your Lordships now to question this construction of the underwriters' obligations, if, indeed, you were disposed to do so.

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The only exception which has hitherto been established to the underwriters' liability, thus construed, is to be found in the case of *Thompson v. Hopper*, 6 El. & Bl. 172, where it was alleged that the shipowner himself knowingly and wilfully sent the ship to sea in an unseaworthy state, and that she was lost in consequence.

It is only necessary to observe upon that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at,—there is no case that warrants your Lordships in going further,—and on the other hand it is easy to see that the arguments employed in this case, if sanctioned by judicial decision, would result in relieving the underwriters from many other losses to which they have hitherto been held liable. For instance, the assured has hitherto always been held protected from loss through the perils insured against, though that loss was brought about through the negligence of his captain or crew. Now the captain has the entire control of the vessel in respect of repair in foreign ports, as of everything else, and if the sixth plea in this case were held to be sufficient without proof of the shipowner's knowledge and wilfulness, the result would be that whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss, though caused by perils of the sea, could be traced to the ship's defective condition, the assured would lose the benefit of his policy. Such a doctrine, once established, would extend equally to the negligent conduct of the master in \*the course sailed by the ship, or the careless management of the ship in an emergency, or the absence of reasonable and proper exertion on the part of the captain or crew.

For these reasons, my Lords, I submit to the House that the judgment of the Court of Exchequer Chamber ought to be reversed.

My Lords, I may state that my noble and learned friend the Lord Chancellor has been made acquainted with the judgment I was about to deliver in this case, and that he desires me to say that he entirely agrees with it, and does not wish to add anything to it.

Lord O'HAGAN:—

My Lords, having had the advantage of perusing the opinion delivered by my noble and learned friend who has just addressed your Lordships, and adopting it, after sufficient consideration, with-

No. 59.—*Dudgeon v. Pembroke*, 2 App. Cas. 298, 299.

out any reserve, I do not propose to go again over the reasons on which it is grounded. I would only say a word with reference to one of the judgments we are reviewing, with which I am unable to concur.

Notwithstanding the suggestions in that judgment, I think that the policy in this case was a time-policy, and nothing else; and I would urge upon your Lordships the importance of abiding by the well-considered decision of this House in *Gibson v. Small*, 4 H. L. C. 353 (p. 86, *ante*), followed by subsequent cases of high authority, and accepted as the rule of mercantile action for so many years, which determined that in such a policy, framed in the usual terms, there is no implied warranty of seaworthiness. That decision was wise, convenient, and safe. It was in accordance with the sound principle which forbids the importation into a written contract, save in exceptional cases which are familiar to us all, of material terms which the parties to it have not thought fit to insert. It was convenient as furnishing one of those “‘plain rules,’ without qualification or exception,” which Lord CAMPBELL has described in *Gibson v. Small* as “most desirable in commercial transactions,” avoiding extreme refinements or the superfluous raising of difficult \* questions from special circumstances. [\* 299] And it was safe; because express stipulation can always be introduced when needful. The want of implied warranty does not protect the insured against the consequences of his own fraud, or wilful concealment, in nullifying the insurance, nor does it deprive the insurer of his protection against such malversation, or of the security he may derive from the inspection which he has the opportunity of making for himself, in the only case to which Lord ST. LEONARDS referred (in *Gibson v. Small*, 4 H. L. C. 417), as possibly justifying the implication of a warranty in a time-policy, *i.e.* when it is effected on a vessel about to sail on a particular voyage. In the case before the House the jurymen have expressly negatived all knowledge of the alleged unseaworthiness on the part of the insurers, and there is no evidence of fraud of any kind.

The principle so long established cannot be disturbed merely upon the suggestion of one of the learned Judges that it is desirable to put difficulties in the way of those who either criminally or negligently send unseaworthy ships on dangerous voyages. If the public interest, for that or any other reason, requires a change in a

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Nos. 58, 59.—*Gibson v. Small*; *Dudgeon v. Pembroke*.—Notes.

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law so well established, it should be made by the authority of the Legislature.

As to the loss of the vessel by the perils of the sea, I can add nothing to the observations of my noble and learned friend.

Lord BLACKBURN:—

My Lords, I also have had an opportunity of perusing the opinion of the noble and learned Lord who moved the judgment of the House in this case, and I perfectly and thoroughly concur in it. I will say no more than that I agree both in the reasoning and in the conclusion.

Lord GORDON:—

My Lords, I am of the same opinion. I think the case of *Gibson v. Small*, 4 H. L. C. 353 (p. 86, *ante*), is decisive of the question in this case. There may, possibly, be questions as to the propriety of the principle thus affirmed, but if a change is desirable, it can only be made \* by the will of the Legislature; and if any proposition to that effect were brought forward, it would probably give rise to considerable discussion.

*Judgment of the Court of Exchequer Chamber reversed; the judgment of the Queen's Bench affirmed; and the respondent to pay to the appellant the costs of the appeal.*

Lords' Journals, 23rd March, 1877.

#### ENGLISH NOTES.

The case of *Fawcett v. Sarsfield* (1856), 6 El. & Bl. 192, 25 L. J. Q. B. 249, is very instructive upon the subject of the above rule. The ship, having been insured by a time-policy, sailed on a voyage in (as it proved) an unseaworthy condition. After being at sea for some time, but without encountering weather to cause unseaworthiness or to place her in actual danger, she was found to be leaky, and the unseaworthiness became so apparent that she was obliged to put into a port for repairs. After again sailing from that port, she was lost by a peril of the sea. The owners were held entitled to recover for the ultimate loss; although the ship had in the first instance sailed in an unseaworthy state, so that, if there had been any implied warranty of seaworthiness, such a warranty was clearly broken. But they were held not entitled to recover the expenses of putting into port to repair; because they were incurred, not by any peril of the sea, but by a necessity immediately arising from the unseaworthy condition in which she originally sailed. Upon the latter point the case was followed in *Ballantyne v. Mackinnon* (C. A. 1896), 1896, 2 Q. B. 455, 65 L. J. Q. B. 616, 75 L. T.

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Nos. 58, 59.—Gibson v. Small; Dudgeon v. Pembroke.—Notes.

95, 45 W. R. 70, where a steamship insured on a time-policy had started for her voyage with an insufficient supply of coal. Left helpless in calm weather forty miles from her port of destination, she was towed in by a steam trawler and a tug, to whom salvage was paid. The owners were held not entitled to recover the salvage from the insurers, that being an expense occasioned not by a peril of the sea, but immediately and solely by the inherent defect in the thing itself; namely, the ship, as furnished for the voyage.

#### AMERICAN NOTES.

Parsons says (1 Insurance, p. 389): "Another question exists as to this implied warranty in case of time-policies, which is involved in still greater difficulty and uncertainty; it is, What is this warranty, or condition, in respect to the continuance and maintenance of the seaworthiness of the vessel? This subject has been very much considered quite recently in England and in this country. The authorities are entirely irreconcilable. Some eminent English Judges go so far as to say that there is no implied warranty of seaworthiness in time-policies. No Court in this country has gone to that extent. In a recent case in New York, the reasoning in the English cases seems to have been approved, and this warranty brought down to the narrowest limits. On the other hand, in a still later case in Massachusetts, this implied warranty is recognized in time-policies not only as distinctly existing, but as subject only to those modifications or qualifications which the nature of time-policies and the circumstances of each case make necessary. In our notes we endeavor to exhibit these conflicting views as fully as the space we can give to them permits. We confess that this latest decision appears to us to be sustained by reasons and arguments which we think it would be difficult to answer. The statement of Lord CAMPBELL, that there is *no* implied warranty in a time-policy, although apparently approved in later English cases, cannot be law. If a vessel insured in her home port for a year sails in utter weakness and decay, and with no peril whatever she sinks in a day, it is impossible that the insured should recover; and so, indeed, Baron PARKE admits, although at one time he seemed to adopt Lord CAMPBELL's view. This broad negation is confined in its application, by the eminent Judges who make it, to the implied warranty of seaworthiness at the beginning of the risk; and the reasoning by which it is sustained seems to be, that a policy on time 'is not a contract of insurance, but an ordinary contract in writing.' We have no doubt, however, that it is a contract of insurance, and one of great use and importance. At the same time we admit that it is an insurance of a peculiar character, and that the warranty of seaworthiness must be construed here and elsewhere with reference to its subject-matter, and in conformity to its character. Time-policies constitute indeed a large and important class of the contracts of insurance in common use; for this method of insurance is much better adapted than any other to many circumstances in which it is desirable that maritime property should be placed under insurance. We have said in our introductory chapter that the requirement

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of seaworthiness of the vessel is of the very essence of the business of insurance. It should be carefully adapted to every kind of maritime condition; but if it be destroyed in any, that kind of insurance will cease. If, for example, the assertion of Lord CAMPBELL and Baron PARKE is to be taken and applied, as literally true, to all time-policies, there would soon be an end of time-policies. Or rather, as this kind of policy has now become almost indispensable, insurers would insert express warranties, making it possible for them to estimate their risks, and to insure on time for premiums which would be safe for insurers, and yet so low as to permit merchants to pay them. If we say, first, that there is an implied warranty of seaworthiness in time-policies, and then, that this warranty must be so qualified as to be adapted to the requirements and circumstances of such risks, the only question is, Where shall we find the necessary or proper qualifying rules?

" Amid such conflict of opinions, and upon a subject in itself so difficult, we can scarcely hope to state any conclusions which would commend themselves as entitled to general adoption. We are willing however to say, first, that the universal requirement of all insurance, that a vessel shall sail on her voyage in a seaworthy condition, applies equally to time-policies. And we draw the inference that in all such policies there is an implied warranty of seaworthiness at the beginning of the voyage. Then we should be unwilling to say that there was the same implied warranty at the beginning of the risk, or of the time; because the seaworthiness then required must depend upon the events which have occurred between the beginning of the voyage and the beginning of the risk. If by reason of sea perils which have occurred, aided by wear and the mere lapse of time, the vessel has come into a condition very far indeed from what would be seaworthy at the beginning of the voyage and she were at sea, the policy might still attach. If she were in port in this bad condition, we should say that the policy would attach, if there had been no negligence in putting her into a better condition. But the main question comes in here. — If the vessel be, when the policy attaches, or at any subsequent period, in a port where she can be repaired and made seaworthy, but these repairs are omitted and she goes to sea in an utterly unseaworthy condition, are the insurers still held? It is plain that they cannot be so held, unless on the supposition, so broadly stated by CAMPBELL and PARKE, that there is no implied warranty of seaworthiness in a time-policy, or else on the milder supposition that, the implied warranty of seaworthiness at the beginning of the voyage being satisfied, this warranty has thereafter no application and no operation. We confess ourselves unable to make either of these suppositions. They seem to us opposed to the very nature and fundamental principles of marine insurance. And holding the principle which we have already stated, — that this warranty of seaworthiness is implied in every contract of insurance in which it is not expressly negatived, and that it is always to be construed in reference to the character and circumstances of the case, — we cannot but think that the essential principle of insurance would be better satisfied by saying that under a time-policy, as under every other policy, the vessel must leave every port in a seaworthy condition, provided she could be put into a seaworthy condition in that port."

## Nos. 58, 59. — Gibson v. Small; Dudgeon v. Pembroke. — Notes.

*Gibson v. Small* is cited in *Van Valkenburgh v. Astor M. Ins. Co.*, 1 Bosworth (N. Y. Super. Ct.), 73. In the subsequent case of *Hathaway v. Sun M. Ins. Co.*, 8 Bosworth, 33, the rule of *Gibson v. Small* was adopted, and the Court gave the following review of the American authorities: “This rule has been adopted to a considerable extent by the Supreme Court of Massachusetts in the case of *Capen v. The Washington Insurance Company*, Nov. 24, 1853, stated by Mr. Phillips (Vol. 1, p. 409, ed. of 1854, reported 12 Cushing, 517). The policy was upon a vessel then at sea, for one year. She arrived at Boston, her home port, then made a passage to Norfolk, and took a cargo for Sicily. Being found, after sailing, unfit to proceed by reason of the weakness and defectiveness of her timber, she put back to Savannah, where it was found that she required extensive repairs, to procure which she sailed with a light cargo for New York, where the repairs would cost less than at Savannah; and on that passage was burnt. The examination at Savannah showed that the condition of her timbers was such that she would have required, within the year, great repairs to fit her for carrying the usual cargoes, on the usual voyages of vessels of her class. Chief Justice SHAW stated the opinion of the Court to be ‘that there was no warranty of seaworthiness in the strictest sense of the term, but that the only implied condition is, that the vessel is in existence as a vessel, at the commencement of the risk, capable of being made useful for navigation, and in a safe condition, whether at sea or in port, and is seaworthy when she first sails; or if she is at sea, that she had sailed in a seaworthy condition, and is safe.’”

“In the leading case in our own Courts (*The American Ins. Co. v. Ogden*, 15 Wend. 535; 20 id. 287) it is assumed that there is an implied warranty of seaworthiness in a time-policy, and it is expressly decided that this implied warranty is complied with if the vessel be in a seaworthy condition at the commencement of the risk; that it is not requisite she should be seaworthy at the beginning of each successive voyage or passage during the continuance of the risk, and that if the vessel, subsequently to the attaching of the risk, sustain damage, and is not improperly refitted at an intermediate port, the insurer is liable for a future loss, unless the same is the result of that omission to refit, and that has arisen from bad faith or want of ordinary care and prudence.”

*Gibson v. Small* was cited and its doctrine adopted in *Merchants' Ins. Co. v. Morrison*, 62 Illinois, 242; 14 Am. Rep. 93, the Court observing: “The question was examined in the English Courts with so much research and ability that it would be idle, if not presumptuous, to attempt to throw any further light upon it.” But the same Court, in *Hoxie v. Pac. M. Ins. Co.*, 7 Allen, 211, held that in a time-policy on a vessel on which the commencement of the risk is in a foreign port, where repairs may be made, there is an implied warranty of seaworthiness both for port and in setting out. The Court said: “It cannot be denied that until the recent discussions arising in the cases of *Capen v. Wash. Ins. Co.* and *Small v. Gibson* it had always been assumed as a settled doctrine of the law of insurance that in policies on ships and vessels, whether for a voyage or for time, there was an implied warranty of seaworthiness.

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"So in the adjudicated cases in this country and in England, and in all the approved text-writers of both countries, it seems to have been assumed without doubt or question that in policies for a specified time, as well as those for specified voyages, there was a warranty by the assured of the seaworthiness of his ship or vessel. *Hucks v. Thornton*, Holt N. P. C. 30; *Hollingworth v. Brodrick*, 7 Ad. & El. 40; *Sadler v. Dixon*, 8 M. & W. 895; 3 Kent Com. (6th ed.) 287, 307; 1 Phil. Ins., §§ 695, 727. In the case of *Martin v. Fishing Ins. Co.*, 20 Pick. 389, which was the case of a policy on a vessel for a term of six months, both counsel and Court assumed that in a policy on time there was an implied warranty that she was seaworthy when the policy attached and the risk commenced. These authorities, and others which might be adduced, verify the statement of Mr. Justice ERLE in *Thompson v. Hopper*, *ubi supra*, that 'it does not appear that any person ever expressed the opinion that there was no warranty in any time-policy, until Baron PARKE spoke in the House of Lords.'

"But although the doctrine of warranty of seaworthiness as applied to time-policies was not doubted or called in question until the recent discussions already alluded to, it was nevertheless suggested long since that some modification of it, as it was usually understood in respect to voyage-policies, might become necessary in certain cases where insurance was effected on a ship or vessel while at sea, for a limited time. Such seems to have been the intimation of the late Chief Justice of this Court, in *Paddock v. Franklin Ins. Co.*, 11 Pick. 231, accompanied however with a distinct intimation that the warranty of seaworthiness, although it might be applied with great liberality in such cases, would not be wholly dispensed with."

"From this brief summary of the authorities, there would seem to be no foundation in them for the position that there is no warranty of seaworthiness in any policies on time—a warranty which is said to lie at the basis of the contract of marine insurance. It is easy to see a good reason for holding that a policy on time, effected on a vessel when at sea, does not include any warranty of her seaworthiness at the commencement of the risk. In such case the insurance is on a 'vessel in an unknown sea in an unknown State.' The insured has no means of knowing her actual condition, or if she is injured and out of repair, of restoring her to a condition of seaworthiness. Both parties enter into the contract with a full knowledge of these facts. It would not only be pushing a rule of law to an unreasonable extent to say that under such circumstances the assured undertakes to warrant his ship, of the condition and circumstances of which he can know nothing, to be then seaworthy for any purpose, but it would be contrary to the manifest intent and understanding of the parties. In such cases, the circumstances attending the making of the contract of insurance tend directly to rebut any implication of a warranty of seaworthiness at the inception of the risk. But when it is attempted to go further, and to say that because in certain cases of insurance on time it cannot be reasonably held that there is an implied warranty of seaworthiness at the inception of the risk, there is no such implied warranty at all in any such policy, whatever may be the circumstances under which the contract was entered into, the reasoning is fallacious and unsound."

No. 60. — *Furtado v. Rogers*, 3 Bos. & P. 191. — Rule.

In 14 Am. & Eng. Enc. of Law, p. 367, the editor states that no warranty of seaworthiness is implied in England in time-policies, citing the principal cases, and then continues: "In the United States generally the law is otherwise;" but his notes hardly bear him out, for they state that the English doctrine prevails (apparently) in the Federal Courts (citing *Union Ins. Co. v. Smith*, 124 United States, 405; *Jones v. Ins. Co.*, 2 Wallace, Jr. (U. S. Cir. Ct.), 278); in Connecticut (*Hoxie v. Home Ins. Co.*, 32 Connecticut, 21; 85 Am. Dec. 240); in Pennsylvania (*Dallam v. Ins. Co.*, 6 Philadelphia, 15); in Wisconsin (*Merchants' M. Ins. Co. v. Sweet*, 6 Wisconsin, 670); apparently in Ohio (*Gazzan v. Cincinnati Ins. Co.*, 6 Ohio, 72); in New York (*America Ins. Co. v. Ogden*, 20 Wendell, 287); in Illinois (*Merchants' Ins. Co. v. Morrison*, 62 Illinois, 242; 14 Am. Rep. 93); and so of late in Massachusetts (*Hoxie v. Pac. M. Ins. Co.*, 7 Allen, 211); although the early cases were the other way (*Capen v. Wash. Ins. Co.*, 12 Cushing, 517).

No. 60. — FURTADO *v.* ROGERS.

(1802.)

## RULE.

AN insurance effected in England in time of peace on foreign property does not cover a loss by capture of that property by a British ship after hostilities between the two countries have been commenced.

***Furtado v. Rogers.***

3 Bos. &amp; P. 191—201 (6 R. R. 752).

***Insurance. — Loss by British Capture. — Implied Exception.***

An insurance effected in England on a French ship previous to the [191] commencement of hostilities between this kingdom and France does not cover a loss by British capture.

Assumpsit on a policy of insurance.

The declaration, after setting out a policy of insurance in the usual form, dated the 19th of October, 1792, on the ship *Petronelli*, "at and from Bayonne to Martinique, and at and from thence to return to Bayonne," and making all the necessary averments, stated the loss in these words: "And the said Joseph Furtado further says, that afterward and after the said ship had so arrived at Martinique aforesaid, in the said writing or policy of assurance mentioned, and whilst she remained there and before her depart-

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No. 60. — **Furtado v. Rogers, 3 Bos. & P. 191, 192.**

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ure from thence, in further prosecution of her said voyage, to return to Bayonne aforesaid, to wit, on the 12th day of November, in the year of our Lord 1793, the said island of Martinique was with force and arms, and in a hostile manner, attacked, captured, and taken by the forces of our present Sovereign Lord the now King, then being at enmity and open war with the said island and the persons exercising the powers of government in the same; and the said ship then and there being at the same island as aforesaid, then and there on the capture of the same, was then and there seized, taken, and captured by the said forces of our said Lord the King, as a prize, and thereby the same ship, with all her tackle, apparel, ordnance, munition, boat, and other furniture thereof, became and was totally lost to the said Joseph Furtado, to wit, at London aforesaid, in the parish and ward aforesaid." The defendant having pleaded the general issue, the cause was tried before Lord ALVANLEY, Ch. J., at the first sittings in this term, when a verdict was found for the plaintiff, subject to the opinion of this

Court upon the following case:—

[\*192] \*The plaintiff was owner of the ship at the time of the insurance, and from thence until the time of the loss hereinafter mentioned. The ship sailed upon the voyage insured in October, 1792, and arrived at Martinique in November following. She remained there until March, 1794, but her remaining there was justified by necessity; and war having broken out between this kingdom and France, she was then, upon the capture of the island of Martinique by the British forces, taken by them as a prize, with forty other French vessels. The plaintiff at the time the policy was effected, and from thence until the action was commenced, was a French subject, and resident at Bayonne, in France, which country was in amity with Great Britain when the policy was effected, and until the month of February, 1793, at which time hostilities commenced between England and France. On the 10th March, 1796, His Majesty granted a license to Messrs. Alves, Rebello, & Co., authorising them to receive from the underwriters on this policy the money for which they had subscribed, and this action was brought under directions from Messrs. Alves, Rebello, & Co., the plaintiff's agents.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover in this action? If the Court should be of opinion that he was, a verdict was to be entered for

No. 60.—*Furtado v. Rogers*, 3 Bos. & P. 192, 193.

the plaintiff; and if the Court should think that the objection to the plaintiff's recovery appeared upon the declaration, so as to entitle the defendant to the full benefit of it upon a motion in arrest of judgment, the verdict was to be entered for the plaintiff, and the defendant was to make such application; but if the Court should be of opinion that the plaintiff was not entitled to recover, and that the objection did not appear upon the record so as to entitle the defendant to such benefit, then a nonsuit was to be entered.

Bayley, Serjt., for the plaintiff.—The question is, Whether, after the cessation of hostilities between England and France, a Frenchman be entitled to recover in the English Courts upon a policy of insurance effected in England before the commencement of hostilities for a loss by British capture during the war? 1st. The authorities are decisive in the plaintiff's favour. In *Planche v. Fletcher*, Doug. 251, the policy, which was on French account, was subscribed on the 7th of July, 1778, and the proclamation for reprisals on the French was dated the 29th of the same month, after which the ship was captured by a King's cutter. Lord MANSFIELD said, "It is indifferent whether the goods were English or French; the risk extends \* to all captures." The cases of [\* 193] *Eden v. Parkinson*, Doug. 732, and *Bermon v. Woodbridge*, Doug. 781, and *Plantamour v. Staples*, 1 T. R. 611, *in notis*, which also occurred in the time of Lord MANSFIELD, were of the same nature, and the plaintiffs were allowed to recover. To these may be added the case of *Tyson v. Gurney*, 3 T. R. 477, which arose in the time of Lord KEYON. That was an insurance by American loyalists, effected on a Dutch ship before the commencement of hostilities between Great Britain and Holland; the loss accrued by British capture, and the plaintiff recovered. These cases include a period of twelve years, from 1778 to 1790; and though it does not appear that the objection now made was expressly raised, yet as all the cases afforded ground for the objection, it must be presumed to have been the understanding of the profession that such an objection could not have been made with success. After such a series of decisions countenancing these insurances, it may be questioned how far it would be consistent with good faith to foreigners to declare them to be illegal. Certainly it is not consistent with good policy to come to a decision which must have the effect of driving all foreign insurances from this country, since no foreigner will think it safe to effect an insurance here, when he

No. 60.—*Furtado v. Rogers*, 3 Bos. & P. 193, 194.

knows that in the event of a war breaking out between this country and his own, his insurance will be rendered unavailable. The cases of *Brandon v. Nesbitt*, 6 T. R. 23 (3 R. R. 109), and *Bristow v. Towers*, 6 T. R. 35, having been determined on the ground of alienage, can afford no assistance to this defendant; but as it appeared in the latter that the loss was occasioned by British capture, and the Court did not decide it at all upon that ground, it affords an additional reason for supposing that even at that time it was not thought a sufficient objection. The case of *Potts v. Bell*, 8 T. R. 548 (5 R. R. 452), will not affect the present question, the insurance there having been effected on a trading with the enemy, which, being illegal itself, renders the insurance illegal also; though if such trading be sanctioned by the King's license, the insurance will be legalised. *Vandyck v. Whitmore*, 1 East, 475. Many authorities, therefore, may be cited in the plaintiff's favour, and none are to be found against him. But 2ndly, It will be contended that it is contrary to sound policy to allow insurances by which the enemy may be indemnified against the acts of the British government at the expense of British subjects. To this it

may be answered that during the continuance of the war [\* 194] the foreigner can derive no benefit from his contract. \*So

long as his recovering would tend to defeat the objects of the British government, by supplying the coffers or encouraging the commerce of its enemies, he is disabled from maintaining an action by his character of an alien enemy. Nor can he calculate with any certainty upon recovering at the restoration of peace, so as to found any commercial speculations upon such expectation. For by the law of England all the property of alien enemies, including their debts, is vested in the Crown; and upon office found the King is entitled to reap the benefit of all contracts made for their advantage. The *Attorney-General v. Weedon*, Parker Rep. 267. After the cessation of hostilities, therefore, the foreigner will not be able to avail himself of his indemnity, unless the Crown neglect to insist upon its rights; in which case it must be presumed that his recovering is not inconsistent with the policy of the State, in the same manner as that presumption authorises an alien enemy to recover even during the war, where he has obtained the King's license for that purpose. It may be remarked that in the 13 Geo. II. an attempt was made to introduce an Act of Parliament to prohibit insurances on enemies' property, without success.

No. 60.—*Furtado v. Rogers*, 3 Bos. & P. 194, 195.

An Act, however, to this effect passed in the 21 Geo. II., c. 4, and another in the 33 Geo. III., c. 27, s. 4, both which were temporary Acts imposing penalties and enacting that such insurances should be void. Had they been void at common law, such enactments would have been superfluous; at least a declaratory clause might have been sufficient.

Best, Serjt., for the defendant.—With respect to the cases which have been cited it may be sufficient to observe that the question which now stands for the determination of the Court did not arise in any of them. Indeed it was then pretty generally understood that the property of an enemy might be insured *flagrante bello*; consequently no dispute could have arisen upon a policy like the present. It is a general principle of law that whatever militates against the interest of the State is contrary to law—the law being made for the protection of the public. No contract, therefore, which is prejudicial to morals, to the revenue, or to any civil establishment, can be enforced in a Court of justice. Upon the same principle the law will not lend its aid to a contract which gives to one of the contracting parties an interest contrary to the interest of the State. In *Foster v. Thackeray*, 1 T. R. 57 n. (1 R. R. 149 n.), an action was brought on a wager that war would be declared

\* with France in three months; and though the case was [\* 195] never finally decided, yet it appears from the expressions of Mr. Justice BULLER in *Good v. Elliott*, 3 T. R. 701, 702 (1 R. R. 803), that a great majority of the Judges were against the action, and he considers it as a case of great authority. And in a case subsequent to *Foster v. Thackeray*, viz. *Atherfold v. Beard*, 2 T. R. 610 (1 R. R. 556), the Court refused to enforce a wager respecting the amount of the hop duties, considering it contrary to the policy of the State to admit the public discussion of the subject to which the wager related. And it seems to have been the opinion of all the Judges in *Good v. Elliott* that wagers which are against the sound policy of the kingdom, and tend to make the party a bad subject, are void. Possibly the insurance of enemies' property during war, in a commercial view may be advantageous, but in a political view it is highly dangerous. It has been supposed, however, that information has been obtained for government through the medium of Lloyd's Coffee-House; but it seems rather too much to expect that those who are most interested in the security of the enemy's ships should be very ready to give information through

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which they may be destroyed. The interest of the underwriters certainly leads them to give information to the enemy of the destination of our own cruisers, and whether they may at any time have been induced to do so, it is at least contrary to all sound policy to suffer the inducement to exist. The effect of such policies of insurance is to defeat the great objects of war. For in proportion to the exertions of the country will be the loss sustained by the enemy; and yet if enemies' property be insured here, those exertions of the government will be directed against its own subjects. One object of war is to destroy the commerce of the enemy; but the end of all insurance is to encourage commercial speculations by distributing the losses among a number of individuals. These objections to a policy effected during war are equally applicable to one effected before the war. It often happens that, previous to the commencement of hostilities, the first act of the government is to seize the foreign vessels then in its own port. But if that property be insured here, the seizure will neither distress the foreigner, nor afford any security to our own government against the acts of foreigners in whose ports our ships may happen to be. It is true that the policy in question was lawful at the time when it was effected. But if it be illegal for an Englishman to insure against the hostile acts \* of the British

[\* 196] government, those acts are not to be considered as falling within the risks described in the policy. It is not to be intended that the defendant contracted to do that which it was unlawful for him to do. Indeed, admitting the contract to have been lawful at the time when it was made, and to have extended generally to all detentions of princes and people, the subsequent conduct of the British government dispenses with the performance of that part of it which relates to the hostile acts of that government. In *Brewster v. Kitchell*, 1 Salk. 198, it is said by HOLT, Ch. J., that "if a man covenant to do a thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the covenant is repealed;" now it is as much competent to the King to declare war as it is to the Parliament to make a statute; and if the commencement of war render it illegal to indemnify the foreigner against the hostile acts of the British government, that part of the contract is as much repealed as if an Act of Parliament had passed for that purpose. It is said that the enemy can receive no indemnity until the restoration of peace. Yet he may speculate

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during the war upon the certainty of receiving his indemnity at a future period; and though it is said that the King may sue for the debt, and thus destroy his expectation, it is much too improbable that such a prerogative would ever be resorted to for the Court to found any argument upon it; and indeed the difficulty of enforcing that prerogative, from the defect of the necessary evidence (of which the greatest part would be in the enemy's possession), would render it almost wholly unavailing.

*Cur. adv. vult.*

The opinion of the Court was now delivered by

Lord ALVANLEY, Ch. J.—As it is of infinite importance to the parties that this case should be decided as speedily as possible, and as we entertain no doubts upon the subject, we think it right to deliver the judgment of the Court without any further delay; at the same time, considering the magnitude of the question, we shall allow the parties to convert this case into a special verdict, in order that the opinion of the highest Court in this kingdom may be taken, if it should be thought necessary. There are two questions for our consideration: 1st, Whether it be lawful for a British subject to insure an enemy from the effect of capture made by his own government? 2ndly, Whether, if that be illegal, the insurance in this case having been made previous to the commencement of hostilities \* will make any difference? [\* 197] As to the first point, it has been understood for some years past to have been the opinion of all Westminster Hall, and I believe of the nation at large, that such insurances are not strictly legal or capable of being enforced in a Court of justice. The cases upon the subject are all brought into a small compass in the two valuable books of Mr. Park and my Brother Marshall. Mr. Park seems to consider the cases of *Brandon v. Nesbitt* and *Bristow v. Towers* as having decided the point (see Park's Insur., p. 14. 249); but after looking very accurately into all the cases, I am ready to admit that there is no direct determination. The above two cases proceeded on the short ground of alienage, which was sufficient to support the decision of the Court without entering into the other question; and I do not think the latter words of Lord KENYON in *Brandon v. Nesbitt*, applied as they are to the case of *Riord v. Bettingham*, support the inference which has been drawn by my Brother Marshall (see Marshall on the Law of Insurance, p. 37, 600), in his book, viz., that his Lordship

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thought that a policy effected previous to the war might be sued upon in the event of peace, even though the loss sustained by the assured arose from British capture. It is well known that for a considerable time, not only some politicians entertained an opinion that insurances on enemy's property were beneficial, but that a great Judge went so far as to try causes in which this point directly appeared, and permitted foreigners in their own names, and for their own benefit, during the war, to recover on policies of insurance on foreign goods against British capture. The opinion of that learned Judge, as to the policy of such insurances, is well known, and it was supposed he would not have sanctioned them unless his opinion in point of law had been equally favourable. But we have now the best evidence that his sentiments in that respect were different from what they were supposed to be. Though he did try causes upon such insurances, he always entertained doubts upon the law, and endeavoured to keep out of sight a question which might oblige him to decide against what he thought for the benefit of the country. This takes off materially from the effect of those cases which have been cited, to induce a supposition that the law of England had tolerated such insurances. How far it is consistent with good faith, after so long an acquiescence, to set up a defence which the foreigner may say [\* 198] he had no reason to expect, is a question for the decision \* of defendant and not that of the Court. We can only say, that although many persons have recovered in such actions, it is equally true that doubts have been entertained by many persons as to their right to recover, and that most of those who were informed upon the subject were firmly persuaded that the objection might have been made with success. This affords a sufficient vindication to the Courts of this country in now deciding this point against a foreigner. In the year 1748 an Act (21 Geo. II., c. 4) passed prohibiting the insurance of French ships and goods during the war; this was at least a legislative declaration of the impolicy of such insurances at that time. From the expiration of that Act to the passing of the 33 Geo. III., c. 27, s. 4, no legislative interference upon the subject ever took place, and previous to the last-mentioned Act the policy in question was effected. By the terms of the policy the underwriters certainly undertake to indemnify the plaintiff against all captors and detentions of princes, without any exception in respect of the acts of the government

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of their own nation. The question then is, Whether the law does not make that exception, and whether it be competent to an English underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences of that war? We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell*, 1 Salk. 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from Bynkershoek (*Quæst. Juris. Pub.*, lib. 1, c. 21; Marshall, p. 31), and part of a passage in Valin (p. 32; Marshall, p. 32). The former says, “Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere;” and the latter, speaking of the conduct of the English during the war of 1756, who permitted these insurances, says, “The consequence was, that one part of that nation restored to us by the effect of insurance \* what the other took from us by the rights [\* 199] of war.” Lord HARDWICKE indeed, in *Henckle v. The Royal Exchange Assurance Company*, 1 Ves. Sen. 320, uses these words: “No determination has been that insurance on enemies’ ships during the war is unlawful; it might be going too far to say all trading with enemies is unlawful, for that general doctrine would go a great way, even where only English goods are exported, and none of the enemies’ imported, which may be very beneficial. I do not go on a foundation of that kind, and there have been several insurances of this sort during the war which a determination upon that point might hurt.” This, however, is but a doubtful opinion as to the legality of such insurances, and not very favourable to them. In *Planche v. Fletcher* Lord MANSFIELD is certainly reported to have said, “It is indifferent whether the goods were English or French, the risk insured extends to all captures;” which seems at first to go a great way towards giving effect to insurances against British capture. But we must suppose this to have

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been said because the defendant did not press the objection; and if the party acquiesced, the expression gives no more weight to the case than belongs to any of the other cases which have been cited, such as *Bermon v. Woodbridge*, *Eden v. Parkinson*, and *Tyson v. Gurney*, in which the question was not raised at all. On the other hand the cases of *Brandon v. Nesbitt* and *Bristow v. Towers* certainly proceeded on the ground of alienage. There is no express declaration, therefore, of the Court of King's Bench, either for or against the legality of such insurances, and the question comes now to be decided for the first time. We are all of opinion that to insure enemies' property was at common law illegal, for the reasons given by the two foreign jurists to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hostilities must be equally unavailable in a Court of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter. Since the case of *Potts v. Bell*, it has been universally understood

that all commercial intercourse with the enemy is to be  
[\* 200] considered as illegal \* at common law (though previous to  
that case a very learned Judge, Mr. Justice BULLER, in *Be<sup>24</sup> v. Gilson*, 1 Bos. & P. 345 (4 R. R. 823), appears to have entertained doubts on that subject), and that consequently all insurances founded upon such intercourse are also illegal. Why are they illegal? Because they are in contravention of His Majesty's object in making war, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in *Potts v. Bell* seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed that the doctrine which

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has prevailed respecting ransom bills tends to favour these insurances; but no action was ever maintained upon a ransom bill in a Court of common law until the case of *Ricord v. Bettenham*, 3 Bur. 1734, 1 Bl. 563, and I have the authority of Sir William Scott for saying that in the Admiralty Court the suit was always instituted by the hostage. The case of *Ricord v. Bettenham*, however, certainly tended to show that such an action might be maintained in the Courts of common law at the suit of an alien enemy. In consequence of this a similar action was brought in *Cornu v. Blackburn*, Doug. 641, and after argument the Court of King's Bench held that it might be sustained. But in *Anthon v. Fisher*, Doug. 649, 650, *in notis*, the contrary was expressly determined upon a writ of error in the Exchequer Chamber. I forbear to enter into the argument suggested at the bar in favour of the defendant, that the law will not enforce a contract founded on a transaction detrimental to the public policy of the State. The ground upon which we decide this case is, that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against British capture, such a contract would be abrogated by the law of England. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz., that all contracts made \* with an enemy inure to the benefit of the King [\* 201] during the war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted; nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as the disinclination to put in force such a prerogative. The plaintiff, I am sorry to say, is not entitled to a return of premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain.

*Judgment for the defendant.*

## ENGLISH NOTES.

The above decision was followed by the Court of King's Bench in the following year in *Kellner v. Le Mesurier* (1803) 4 East, 396, 7 R. R.

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581, *Gamba v. Le Mesurier* (1803), 4 East, 407, 7 R. R. 590, and *Brandon v. Curling* (1803), 4 East, 410, 7 R. R. 592.

Where an insurance is ignorantly made after the commencement of hostilities upon property which has already become enemies' property, the insurance is void, and the premium may be recovered. *Oom v. Bruce* (1810), 12 East, 225, 11 R. R. 367.

The principle of the rule depends upon the property which is taken by the act of our government being enemies' property, and does not apply to an insurance of neutral property, although loss or damage may be occasioned to the neutral by an act of the State intended against the enemy. *Parker v. Blakes* (1808), 9 East, 283, 9 R. R. 558.

Nor does the principle apply to an act of detention or restraint of property for a temporary purpose not connected with hostilities; the government of the country of the insured being at peace with that of the country of the insurers. See next case, *Aubert v. Gray* (Ex. Ch. 1862), 3 B. & S. 169, 32 L. J. Q. B. 50 (overruling *Conway v. Gray*, 10 East, 536, and other cases). The principle would probably be held to be further restricted in the case of a war between two countries which have adopted the Declaration of Paris. For as in that case the carrying of enemies' goods in a neutral ship would be protected, it seems to follow that the insurance of goods so carried would not be *ipso facto* illegal; and if the ship were captured and the voyage lost owing to a mistake as to the neutral character, a question might arise not exactly covered by the authorities. See on a similar point *Esposito v. Bowden* (1855), cited in notes to *Potts v. Bell*, No. 4 of "Alien," 2 R. C. 654.

## AMERICAN NOTES.

Mr. May, citing the principal case (1 Insurance, sect. 36), remarks: "This last case was decided in the face of a practice which had grown up under the patronage of Lord MANSFIELD, who went so far as to try causes in which the same question arose, and permitted foreigners, in their own names and for their own benefit, during the war, to recover on policies of insurance on foreign goods against British capture. Yet Lord ALVANLEY, although he could not help animadverting upon the immorality of the defence, felt bound to sustain it on the ground that no subject can be permitted to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if expressly forbidden by an Act of Parliament. When hostilities commence between the countries of the underwriter and the insured, the former is forbidden to fulfil his contract." Parsons cites this case (1 Marine Insurance, p. 18), and Duer (1 Insurance, pp. 420, 470), who says: "It was not until many years after the death of Lord MANSFIELD that the Judges in England, with apparent reluctance, arrived at the conclusion that an insurance upon enemies' property could not be sustained. The first decisions seem to have proceeded upon

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the sole ground of the personal disability of an alien enemy to maintain a suit upon the policy during the war; but at length the entire invalidity of the contract itself, as repugnant alike to the dictates of sound policy and the clearest maxims of the law, was fully confessed and established."

This general doctrine is recognized in this country. *The Rapid*, 8 Cranch (U. S. Sup. Ct.), 155; *Prize Cases*, 2 Black (U. S. Sup. Ct.), 687; *Kershaw v. Kelsey*, 100 Massachusetts, 561; 97 Am. Dec. 124; 1 Am. Rep. 142, where GRAY, J., observed: "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases, the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The question of the effect of war upon contracts was examined by KENT, Chancellor, with great learning and elegance in *Griswold v. Waddington*, 16 Johnson (N. Y.) 438, where he reviews all the English decisions, including the principal case, and concluding: "Here we have then a series of decisions at law touching the lawfulness of any commercial intercourse with an enemy, in which the language of the Courts appears to have been consistent and decided, and the question to have been as clearly, uniformly, and incontrovertibly settled as we can possibly expect in any case and from any human tribunals." He also recites and adopts the "plain, clear, and masterly reasoning" of Sir William Scott, in *The Hoop* (1 Rob. 196), and concludes: "I can only add, upon the conclusion of that decision, that any Court of justice that can expound the law with such admirable perspicuity, and maintain it with such intrepid firmness, in spite of all personal feelings and of the hardships and compassion of the case, must impart honor to the country in which it is instituted, as well as command the confidence and esteem of the rest of mankind." Commenting on the decision of the Federal Supreme Court in *The Rapid* (*supra*), he says: "Here then we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all interchange, or transfer, or removal of property, to all negotiation or contracts, to all communication, to all locomotive intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat."

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It must be observed that the American decisions are all in respect to contracts made *during* war, and not to the effect of war upon a previous contract, and the precise question of the principal case — insurance before war — does not seem to have arisen except in *Leathers v. Com. Ins. Co.*, 2 Bush (Kentucky), 296; 92 Am. Dec. 483. This was an action on notes for premiums for marine insurance, under a policy made before the Civil War; and the Court, without much discussion, said that "all pre-existing contracts of continuing performance, as those of partnership and insurance, are dissolved by intervening war," and that this principle applied to civil war; but this was *obiter*, for the Court concluded that the insurance had expired by its own terms before the war; and this expression in respect to insurance was disapproved by the same Court in *N. Y. L. Ins. Co. v. Clopton*, 7 Bush, 179; 3 Am. Rep. 290, as "inapposite," "immaterial," "inadvertent," and "*obiter*," and "entitled to no consideration."

In *Hallet v. Jenks*, 3 Cranch (U. S. Sup. Ct.), 210, a vessel belonging to citizens of this country was driven by distress into a French port, in 1799, during the period of forbidden intercourse between the countries, and having landed her cargo to repair, was prohibited from reloading it, or taking away anything but produce. It was held that this was not forbidden by the non-intercourse act, and the voyage was not illegal so as to avoid the insurance on the new cargo. MARSHALL, Ch. J., was of opinion that even if actual war had existed, the result would have been the same.

But in respect to the late Civil War in this country, it has been held that it did not destroy, but merely suspended, a contract of life insurance, and that subsequent payment of premiums would revive it. *Cohen v. N. Y. M. L. Ins. Co.*, 50 New York, 610; 10 Am. Rep. 610, citing the principal case: *Mut. Ben. Life Ins. Co. v. Atwood's Adm'r*, 24 Grattan (Virginia), 497; 18 Am. Rep. 652; *Mut. Ben. Life Ins. Co. v. Hillyard*, 35 New Jersey Law, 444; 18 Am. Rep. 741; *New York L. Ins. Co. v. Clopton*, 7 Bush (Kentucky), 179; 3 Am. Rep. 290; *Semmes v. Hartford Ins. Co.*, 13 Wallace (U. S. Sup. Ct.), 158; *Hamilton v. Mut. L. Ins. Co.*, 9 Blatchford (U. S. Circ. Ct.), 234; *Statham v. N. Y. L. Ins. Co.*, 45 Mississippi, 581; 7 Am. Rep. 737; reversed, 93 United States, 24 (two Judges dissenting).

*Contra*: *Dillard v. Manhattan L. Ins. Co.*, 44 Georgia, 119; 9 Am. Rep. 167; *Worthington v. Charter Oak Life Ins. Co.*, 41 Connecticut, 372; 19 Am. Rep. 495, apparently referring to the principal case; *N. Y. L. Ins. Co. v. Statham*, 93 United States, 24, holding that the insurer was still bound to pay the equitable value of the policy at the time of the default in premiums. (The general question may be regarded as still open in that Court.) And see *Hennen v. Gilman*, 20 Louisiana Annual, 241; 96 Am. Dec. 396.

## No. 61.—Aubert v. Gray, 3 B. &amp; S. 163.—Rule.

No. 61.—AUBERT *v.* GRAY.

(EX. CH. 1862.)

## RULE.

THE acts of the government of the country of the insured are not to be imputed to the insured, so as to deprive him of the benefit of a policy which is expressed so as to cover losses caused by such acts, there being nothing inherently unlawful in the object of the insurance.

**Aubert v. Gray.**

3 Best & Smith, 163—182 (s. c. 32 L. J. Q. B. 50; 9 Jur. (N. S.) 714; 7 L. T. 469; 11 W. R. 27).

*Marine Insurance.—Restraints of Princes, &c.—Hostilities.* [163]

1. The clause in an ordinary policy of marine insurance on a ship and goods which insures against losses occasioned by “arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever,” applies to a seizure of the ship in consequence of an embargo laid on her by the sovereign of the country of the assured, for the purpose of carrying on a war with another power: per CROMPTON and BLACKBURN, JJ., in this Court: and affirmed in the Exchequer Chamber, per ERLE, Ch. J., WILLIAMS and HEATING, JJ., and BRAMWELL, B.; *dubitante*, POLLOCK, C. B.

2. There is a distinction in this respect between an embargo, in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility either existing or expected, and an embargo connected with such hostility: per the same Judges in the Exchequer Chamber.

3. *Quære*, if the act of seizure was a lawful act under the municipal law of the country of the assured? per the same Judges in the Exchequer Chamber.

The declaration alleged that the plaintiffs, on the 3rd October, 1859, according to the usage and custom of merchants, caused to be made a certain policy of insurance, purporting thereby, and containing therein, that the plaintiffs, by the name of Aubert, Powell, & Co., or as agents, as well in their own name as for and in the name and names of all and every other person or persons to whom the same did, should, or might appertain, in part or in all, did make assurance, and did cause themselves and them and every of them to be insured, lost or not lost, at and from London to Alicante, with liberty to call at any intermediate port or ports,

## No. 61.—Aubert v. Gray, 3 B. &amp; S. 163-165.

including all risk of craft, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called *The Jovellanos*, whereof was master under God for the said voyage , or whosoever else should go for master in the \* said ship, or by whatsoever other name or names the said ship, or the master thereof, was or should be named or called, beginning the adventure upon the goods and merchandises from the loading thereof aboard the ship as above, upon the ship, &c., and should so continue and endure during her abode there upon the ship, &c.; and, further, until the ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, should be arrived at as above upon the ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same should be there discharged and safely landed. And it should be lawful for the ship, &c., in the voyage, to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever without prejudice to the insurance. The ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in the policy, were and should be valued at £1800 on B. R. Y. thirty bales of carpets so valued, general average and charges as per foreign statement, if so made up. Touching the adventures and perils which they, the assurers, were contented to bear, and did take upon themselves in the voyage, they were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or should come to the hurt, detriment, or damage of the goods and merchandises, and ship, &c., or any part thereof; and, in [\* 165] case of any loss or misfortune, it should be lawful to \* the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the goods and merchandises, and ship, &c., or any part thereof, without prejudice to the insurance, to the charges whereof they, the assurers, would contribute, each one according to the rate and quantity of his sum therein assured. And it was agreed by them, the assurers, that the said writing or policy of assurance should be

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of as much force and effect as the surest writing or policy of assurance theretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so they, the assurers, were contented, and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for the said assurance by the assured at and after the rate of twenty shillings per cent. And by a certain memorandum, thereunder written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under £5 per cent; and all other goods, also the ship and freight, were warranted free from average under £3 per cent, unless general, or the ship should be stranded. And thereupon, in consideration of the premises, and that the plaintiffs had paid to the defendant the sum of 20s. as a premium or reward for the insurance of £100 of and upon the premises in the policy mentioned, the defendant then became and was an insurer, and duly subscribed the said policy of insurance as such insurer of the sum of £100 upon \* the said goods in [\* 166] the said ship or vessel, for the said voyage in the said policy of insurance mentioned. The declaration then averred that the goods mentioned in the policy, to wit, thirty bales of carpets, of great value, had been and were shipped and loaded at London aforesaid, in and on board the ship or vessel in the policy mentioned, to be carried and conveyed thereon on the voyage in the policy mentioned, and that they the plaintiffs, one Bonifacio Ruiz de Velasco, and certain persons carrying on business under the name, style, or firm of Bonifacio Ruiz de Velasco, some or one of them, were then and continually thence, until and at the time of the loss, &c., interested in the goods in the policy mentioned and so shipped on board the ship as aforesaid, to a large value and amount, to wit, the value and amount of all the moneys by them ever insured or caused to be insured thereon; and that the insurance was made by Aubert, Powell, & Co., for the use and benefit and on the account of the person or persons so interested as aforesaid. It then alleged that the said ship or vessel, with the said goods on board thereof, departed and set sail from London aforesaid on her said voyage in the said policy mentioned; and

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that afterwards, and during the continuance of the risk in the policy mentioned, the goods so insured as aforesaid, by perils, losses and misfortunes insured against by the said policy, became and were greatly damaged, injured, spoiled, and deteriorated in value, and thereby and by reason of the premises the person or persons so interested as aforesaid sustained an average damage or loss on the goods to a much larger amount than £3 per cent on all the money insured thereon, to wit, to the amount of £31 0s. 7d by the hundred for each and every £100 insured thereon by the plaintiffs ; whereby the defendant then became liable to [\*167] \* pay to the person or persons so interested as aforesaid a large sum of money, to wit, the sum of £31 0s. 7d., being his the defendant's proportion of the said average loss for and in respect of the said sum of £100 so by him insured as aforesaid ; and averred that the person or persons so interested as aforesaid did afterwards, by reason and in consequence of the said loss so occasioned as aforesaid by the said perils, losses, and misfortunes so insured against, by their factors and servants, sue, labour, and travel for, in and about the defence, safeguard, and recovery of the goods, and in so doing did necessarily expend a large sum of money, whereby the defendant, according to the terms of the policy, then became liable to pay to the person or persons so interested as aforesaid a further sum of money, to wit, the sum of £6, being the rateable part or proportion of the expense aforesaid which the defendant ought to have paid in respect of the insurance aforesaid : concluding with the averment that all things had been done and happened, &c. : and the plaintiffs claimed £50.

Plea. Before and at the time of the making of the policy, and thence continually until and at the time of the losses, the person or persons so interested in the goods, and for whose use and benefit, and on whose account, the insurance was made were, and each of them was, Spaniards and subjects of the Queen of Spain, and domiciled in the kingdom of Spain. And that, before the losses, or any of them, the ship, in the course of the voyage, arrived at Corunna, in the kingdom of Spain, and that, while at Corunna, an embargo was laid upon the ship by the Queen of Spain, and the ship was taken possession of by the Queen of [\*168] Spain, \* and her agents duly authorised by her, for the purpose of conveying troops to Malaga, for the purpose of carrying on a war in which the Queen of Spain then was engaged

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with the Emperor of Morocco, and the captain and crew were compelled by the said Queen and her agents to remove the goods from the ship to make room for the troops, and the captain and crew were compelled by the Queen and her agents to remove the goods during stormy and tempestuous weather, and the goods were, by the Queen and her agents, placed on the open and uncovered quays at Corunna, the weather being then wet and rainy, and thereby the goods became and were damaged, injured, spoiled, and deteriorated in value, &c. And that the goods were damaged, injured, spoiled, and deteriorated solely by the premises in this plea mentioned, and not by any other perils, losses, or misfortunes whatever ; and that the suing, labouring, and travelling mentioned were rendered necessary solely by the premises in this plea mentioned, and not otherwise.

Demurrer, and joinder in demurrer.

The case was heard by CROMPTON and BLACKBURN, JJ. HILL, J., was present during a portion of the time, but took no part.

After hearing argument, this Court, on the authority of the [169] cases of *Conway v. Gray*, 10 East, 536, *Conway v. Forbes*, 10 East, 539, and *Maury v. Shedd*en, 10 East, 540, relied on by the defendant, gave judgment for the plaintiffs, but intimated that in the conflict of authorities the question ought to be determined by a Court of Error.

(IN THE EXCHEQUER CHAMBER.)

**Aubert v. Gray.**

Error having been brought on the judgment accordingly, it was argued before ERLE, Ch. J., POLLOCK, C. B., WILLIAMS and KEATING, JJ., and BRAMWELL, B. The Court, after hearing arguments in which the conflicting authorities were fully cited, took time for consideration.

The judgment of the Court was now delivered by [180]

ERLE, Ch. J.—The plaintiffs, Spaniards, sued on a policy on goods by which they were insured, *inter alia*, against restraints of princes, in the usual form.

The ship was restrained at Corunna by order of the \* Spanish government, which had a temporary need for transports, and laid an embargo for that object on all vessels in some of its ports at that time, and so the loss was occasioned. The plaintiffs affirmed that the loss was caused by the restraint of a prince.

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And if the Court is to give effect to the intention of the parties, expressed by the words of the contract according to their ordinary meaning, they are right in this affirmation — the restraint of a prince caused the loss, the assured have used the words which express that they are to be indemnified against loss from any restraint of any prince; and in mercantile interest, the loss and the need for indemnity against it is the same, whoever be the prince who restrained the ship.

The defendant alleges that the ship was restrained by the act of the plaintiffs themselves, and he founds this allegation on the fiction that every subject of every State consents to and adopts as his own every act of the government of his State, according to the decision of *Conwy v. Gray*, 10 East, 536. And he contended that a restraint by the Spanish government is a restraint by every Spaniard, and so by the plaintiffs.

The Court below gave judgment for the truth against that fiction, and in our opinion the Court below was right. Each party relied on the several authorities which he cited, but it is not now expedient to go through them with an attempt to reconcile them; they are in such apparent inconsistency that a Court of Error has the duty of resorting to the governing principle, and deciding in accordance therewith.

The governing principle for the construction of contracts is to give effect to the intention of the parties expressed in the [\* 182] words of their contract; and, as before \* stated, according to that principle the plaintiffs were entitled to succeed.

The assertion that the act of the government is the act of each subject of that government, is never really true. In representative governments it may have a partial semblance of truth, but in despotic governments it is without that semblance.

We were much pressed with the argument that the case of *Conwy v. Gray*, 10 East, 536, has been constantly acted on by all parties interested in insurance law. The answer is, that the fact is disputed. The treatises lead to a contrary conclusion; and, even if the assertion were true, still the plaintiffs ought to have our judgment, provided we think that the decision of the inferior Court, which would bind till it was overruled, was contrary to law: and that is our opinion.

This judgment recognises a marked distinction between an embargo in a time when there is peace between the countries of the

## No. 61.—Aubert v. Gray, 3 B. &amp; S. 182.—Notes.

insurer and the assured, laid on for a purpose wholly unconnected with hostility, either existing or expected, and an embargo connected with such hostility; therefore this judgment does not interfere with any of the decisions on points connected with war.

It should also be understood that we do not say if the act of seizure was a lawful act under the municipal law of Spain, that, as against a Spanish subject, such seizure would be within the insurance.

The LORD CHIEF BARON authorises me to say that, although he does not entirely concur with this judgment, he is not prepared to dissent from the decision of this Court and the Court below.

*Judgment affirmed.*

## ENGLISH NOTES.

The above decision, being that of the Exchequer Chamber, must be taken as finally settling the law, and to have set aside the decision in *Conway v. Gray* and other authorities decided on the principle referred to in the judgment, p. 143, *supra*. The result of the decision is neatly stated by Arnould (*Insurance*, 6th ed., p. 738) to be “that the assured is not to be identified with the acts of his own government unless the existence of hostilities between it and the government of the insurers renders any such contract of indemnity incompatible with that highest law — the *salus populi* — under the insurer’s government.”

## AMERICAN NOTES.

Although the decision turned upon the question of a foreign judgment, this principle was recognized, upon elaborate review of the existing English decisions, in *Francis v. Ocean Ins. Co.*, 6 Cowen (N. Y. Sup. Ct., A. D. 1826), 404. Here the Court, after considering *Conway v. Gray*, 10 East, 536, observed: “The contract of insurance is peculiarly one of equity and good faith, and I should regret to see it subjected to so technical and fanciful a rule of construction as that which we have been considering. All the cases admit that detention by embargo, or other act of any other government than that of the assured, is one of the perils covered by the ordinary policy, and is good ground of abandonment. That an embargo by the government of the assured is as much within the actual contemplation of the parties as an embargo by any other government, cannot be questioned; nor that the citizens of a country have no actual participation in the acts of the government, in any sense which would make it a violation of good faith to permit them to make those acts the foundation of a claim against a foreign underwriter. It strikes me as unworthy of the advanced intelligence of the age, and of the enlightened condition of its jurisprudence, to suffer the symmetry of so important a department of the commercial law to be broken in upon, on the

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strength of a notion so purely theoretical. This is the first time, I believe, in which this question has come before an American Court; and I have, for that reason, dwelt upon it longer than was necessary for the purposes of the case which we are now deciding."

This decision was affirmed in 2 Wendell, 64, where the Court, in regard to the point "that the assured cannot recover for an act done under the authority of his own State," considered that it was not in the case, and that "there is a peculiar satisfaction in being relieved from the investigation and decision of the point. I have looked into it sufficiently to discover that it is one of great difficulty, and in reference to which the decisions of the English Courts cannot be relied upon, as well from their own contradictions as from the peculiar political principles which control that government and its Courts. It is identified with great principles of civil liberty, and with the fundamental doctrines of the reciprocal rights and duties of governments and their subjects, which have furnished themes for copious illustration by the statesmen and jurists of the world. Upon all these questions the statesmen of our own country have maintained opinions which have been combated by those of foreign countries, but which, I doubt not, will one day become the law of this country. At present it is as unnecessary as it would be presumptuous in me to attempt to ascertain and define the existing law in respect to the question how far and in what cases a citizen is bound to look to his own government only for redress for injuries committed by the judicial, legislative, or executive departments, within the scope of their authority."

The same view was taken, *obiter*, in *Delano v. Bedford Ins. Co.*, 10 Massachusetts, 351, 352, where the Court said: "An embargo is a restraint and detention by public authority, and may be considered as within the import of the clause in question." "For every purpose of the present inquiry, the embargo by the law of the United States has been considered as a loss within the policy, if any restraint or detention would be." "A restraint and detention by an embargo has been determined to be a constructive total loss." But the Court restrict the privilege of the assured to abandonment, and this is held in *Ogden v. N. Y. F. Ins. Co.*, 12 Johnson (N. Y. Ct. of Errors), 25; *McBride v. M. Ins. Co.*, 5 Johnson, 299.

The matter was considered by KENT, Ch. J., in *McBride v. Marine Ins. Co.*, 5 Johnson (N. Y.), 308, A. D. 1810, where he said: "There is no decision in the English books which comes up to the question, though the uniform language of the cases, and of the writers on insurance, is in favor of the right of the assured, in a case like the present, to abandon and recover. They make no distinction between a foreign and a domestic embargo."

"In addition to this, we have a very respectable authority at home on the point now presented. I allude to the case of *Odlin v. The Insurance Company of Pennsylvania*, in the Circuit Court of the United States (Hall's Law Journal, Vol. II. p. 221). Judge WASHINGTON went through all the cases that bear upon the question, and examined it, upon principles of law and public policy, and concluded that the assured had a right to abandon, and claim a total loss. After the clear and masterly view of the subject which was taken in that case, it becomes unnecessary to examine it here at large; and I think that I need not do much more than to declare that I yield my full assent to that opinion.

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“An embargo is not required to be, upon the face of the act, definite as to time. It is frequently otherwise; and the case of the British embargo on vessels bound to Leghorn, as stated in *Hadley v. Clarke* (8 Term Rep. 259), is a pertinent and strong instance of the kind. But it is, from the very nature and policy of the measure, a temporary restraint. It suspends, but does not dissolve, the contract of insurance, any more than the contract to carry goods. The error of the counsel for the defendants consists in considering the embargo imposed by Congress as a permanent prohibition, working a dissolution of the contract. We must judge of the act from what it purports to be, and from the terms which it uses. An embargo, *ex vi termini*, means only a temporary suspension of trade. A general and permanent prohibition of trade would not be an embargo. It would be an act too violent to be endured, and is not to be presumed. It is equally a very forced argument to liken this case to a contract to do an unlawful act, or to perform an illegal voyage. The voyage commenced before the law existed. It was not the object of the policy to violate any law. It had a contrary tendency. It was to indemnify against arrests and detentions, and not to indemnify for resistance to them. ‘The policy of the State,’ as Lord ALVANLEY observed, ‘is not concerned in preventing one British subject from insuring another against the effects of an embargo laid by the British government.’

“The counsel referred to some recent decisions in England, arising under our embargo, and which are reported in the *addenda* to Park (6th ed. p. 639); but they will not be found, on examination, to have declared a different rule of law, as applicable to this case, from that which we deem the correct one. The Court of K. B. decided that an American citizen could not recover from a British underwriter, under an abandonment founded upon our embargo, because every American subject was to be deemed a party to the Act of Congress, and shall not be permitted to indemnify himself at the expense of a British subject, for a loss arising from his own act. This is similar to the reasoning suggested by Lord ALVANLEY, in the case of *Touteng v. Hubbard* (3 Bos. & Pull. 291), and it appears to be drawn from political considerations rather than from principles of law. Whether the Courts of this and of other countries would or would not adopt a similar rule, under similar circumstances, we need not now discuss. It is sufficient in this case to say that the rule is not applicable. Lord ELLENBOROUGH admits that ‘where the insured and insurer are both subjects of the same State, the question will stand upon very different grounds of consideration.’ And, indeed, in *Page v. Thompson* (Park, 6th ed. 109) he is said to have ruled differently, that being a case between British subjects. When both parties belong to the same government, the act of the government is as much the act of one party as of the other, and each ought to be equally estopped from taking advantage of it, to the prejudice of the other. To consider it as amounting to an agreement between the two parties to dissolve the contract would be pushing the doctrine to an extravagant length. A domestic embargo would, upon such a refined principle, dissolve all contracts of affreightment and for wages, contrary to the settled rule both in England and France.”

Of this matter Mr. Duer says, citing *Conway v. Gray* (1 Insurance, 351):

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No. 62.—Rich v. Parker.—Rule.

“As a general rule, the effect of a subsequent law prohibiting the acts necessary to the performance of a contract, already made, is to dissolve the contract without prejudice to either of the parties; but from this rule the operation of an embargo upon a subsisting policy is an exception. Where the voyage, insured by a policy *at* and *from* the port of departure, is rendered illegal before the policy has attached, by a law of revenue or trade, or the provisions of a treaty, the contract is annulled, without any right to the assured to claim an indemnity, or even, generally speaking, a return of premium; but the defeat of the voyage by an embargo *after* the policy has attached is not considered as a dissolution of the contract, but as a loss by a peril insured against, entitling the assured, upon an abandonment, to a recovery of the whole sum insured. It is a total loss by an arrest or detainment of the government, and as such is covered by the express words of the policy. When it is certain that the embargo will be of short duration, the assured may elect to consider the voyage, not as defeated, but suspended, and may resume its prosecution under the policy, when the temporary restraint is removed. But although the contract of insurance is not dissolved so long as the vessel remains in port, yet should she sail, or attempt to sail, in violation of the embargo, this act of positive illegality, whether followed by a seizure or not, I cannot doubt, would avoid the policy, and discharge the insurers. That, in the event of a seizure, they would not be liable is certain.” See *Odlin v. Ins. Co.*, 2 Washington (U. S. Circ. Ct.), 312.

SECTION VI.—*Construction.*

## (3) EXPRESS WARRANTIES AND EXCEPTIONS.

No. 62.—RICH *v.* PARKER.

(1798.)

No. 63.—BARING *v.* CLAGETT.

(1802.)

## RULE.

A WARRANTY of the neutral or national character of a ship is sufficiently expressed by the description of the ship on the face of the policy as “an American,” &c.; and, in order to comply with the warranty, the ship must be furnished with the proper documents to establish her character to be entitled to immunity according to the law of nations or any special treaty to which the government of the country to which the ship is stated to belong is a party.

**Rich v. Parker.**

7 Term Reports, 705-711 (4 R. R. 552).

***Insurance. — Express Warranty. — Nationality of Ship. — Ship's Papers.***

A warranty in a policy of insurance that the ship is American property means that the ship is entitled to all the privileges of an American flag; and if she has no passport on board (which is required by the treaty between France and America), the warranty is not complied with, and the assured cannot recover against the underwriter, though in fact the ship suffers no inconveniences in the voyage from the want of the passport. [705]

This was an action on two policies of insurance, one on the ship the *Atlantic*, the other on goods on board her, from London to Guernsey, from thence to the coast of Africa, during her stay and trade there, and at and from thence to her port or ports of discharge in all or any of the British West India Islands \*and America. The ship and goods were warranted to be [706] American property. The plaintiff averred that the ship and goods were American, and then stated that the ship sailed from London to Guernsey, and from thence to the coast of Africa, where she was captured by an enemy.

The defendant pleaded the general issue, and on the trial before Lord KENYON, at Guildhall, a special verdict was found; which (after stating the making of the policies, the sailing and capture of the ship as set forth in the declaration) stated that the ship, the *Atlantic*, was an American ship and the property of the plaintiff, a native and citizen of the United States of America, and that the goods were American property. It then set forth the treaty between France and the United States of America, in 1778; in which it was agreed (*inter alia*) that the ships and vessels belonging to the subjects of the other ally must be furnished with sea-letters, or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the ship, that it might thereby appear that the ship really and truly belonged to the subjects of one of the parties; which passport should be made out and granted according to the form annexed. And it was further agreed that if the ships of the subjects of either of the parties should be met with, either sailing along the coast or on the high seas, by any ships of war of the other, or by any privateers, the ships of war

## No. 62.—Rich v. Parker, 7 T. R. 706, 707.

or privateers, for the avoiding of any disorder, should remain out of cannon-shot, and might send their boats on board the merchant ship which they should so meet with, and might enter her to the number of two or three men only, to whom the master or commander of such ship or vessel should exhibit his passport concerning the property of the ship, made out according to the form inserted in that treaty. And that the ship, when she should have shown such passport, should be free and at liberty to pursue her voyage, so as it should not be lawful to molest or search in any manner, or to give her chase, or to force her to quit her intended course. The verdict then stated, that before and at the time of sailing of the ship, &c., this country was engaged in a war with France; and that the ship when she so sailed from London on her voyage for Guernsey had not on board any sea-letter or passport made out and granted for her according to the form annexed to the treaty; but that at the time of her sailing

from Guernsey and from thence continually, afterwards, [\*707] until, and at the time of the \*capture she was furnished with and had on board her such a sea-letter or passport, &c., and which was exhibited and shown at the time of her capture and loss, by the master of the ship, to the commander of the French privateer. But whether, &c.

Park, for the plaintiff, after stating the question to be, whether or not the warranty in the policy, that the ship and cargo were American property, had been complied with, argued in the affirmative. Whether or not a warranty has been complied with is a question of fact to be established by evidence; now here that fact is expressly found by the jury, and that precludes all further argument. The defendant however insists that the ship was not American, because she had not the passport on board during the former part of the voyage. But, in the first place, the passport was on board before, and at the time of the capture; and it does not appear that the ship suffered the least inconvenience or interruption from not having it on board when she sailed from London to Guernsey. And in the next place, the want of that passport neither negatives the warranty that the ship and goods were American, nor was it a cause of seizure or confiscation either by the law of nations or by the treaty between France and America. Whether the ship were or were not American is one question, whether or not she had the passport on board is another, not

## No. 62.—Rich v. Parker, 7 T. R. 707, 708.

depending on the former. There is no pretence to say that the want of this passport was a cause of seizure or confiscation by the law of nations. It has never been holden that the want of such a paper disproved the warranty of neutrality. The want of certain documents may indeed afford a ground of suspicion that the ship is not neutral, and when connected with other circumstances may be a ground of confiscation; but there is no instance of a sentence of condemnation merely on the ground that the ship had not particular papers on board. Even if there had been a sentence in a foreign Court condemning this ship on this ground, and that reason had been stated as the foundation of the sentence, it would not have been conclusive here. *Culvert v. Bovill*, 7 T. R. 523 (4 R. R. 517). The circumstance of material papers being thrown overboard just before the ship is taken, raises a stronger suspicion than the want of such a document as a passport, but that alone is not a sufficient ground of condemnation. *Bernardi v. Motteux*, Dougl. 574. And in *Saloucci v. Johnson*, Park's Insur. 415, it was not even argued that the want of a charter-party was a ground of \*condemnation. Then considering [\*708] the treaty between France and America, the requiring of the passport is merely a regulation of convenience between the two States, having for its object that which is stated in the treaty, ‘so as it should not be lawful to molest or search in any manner, or to give her chase, or to force her to quit her intended voyage.’ By the law of nations, any ship may be stopped on the high seas in time of war by either of the belligerent powers, in order to examine whether she is carrying any succours to an enemy, to avoid which, one of the articles in this treaty was inserted. The infraction of this treaty may be a cause of complaint as between the two nations, but as between the subjects of one of those nations and the subjects of any other nation it is not a cause of confiscation, nor does it disprove the warranty of neutrality. If indeed the ship had been stopped on the high seas, and for want of this paper had been carried into a French port, perhaps that might have avoided the policy on the ground of a deviation, inasmuch as that would have arisen from the master's neglect; but that was not the case here, the passport being on board when the ship was taken.

Giles, for the defendant.—It is not sufficient for the insured to say that the ship and cargo were American; in order to charge the underwriter it must appear that the ship had all the privileges

## No. 62.—Rich v. Parker, 7 T. R. 708, 709.

of an American flag. Now it is stated in this verdict that the ship in question, when she first sailed, had not the passport which is required by the treaty with France, and that subjected her to greater risks and interruptions than she would have been subject to if she had had this passport, and therefore the underwriter is discharged. This comes within the principle on which the cases of *Law v. Hollingsworth*, 7 T. R. 160, and *Farmer v. Legg*, 7 T. R. 186, were decided, where it was holden that the assured could not recover; in the latter, because the captain of an African slave ship had not the certificate of his service required by the Stat. 31 Geo. III., c. 54, s. 7; in the former, because there was no pilot on board; and in which case Lord KENYON said, “The principle on which this case must be determined seems to be admitted on all hands, namely, that the assured cannot recover on a policy of assurance, unless they equip the ship with everything necessary to her navigation during the voyage; the ship herself must be seaworthy, she must have a sufficient crew, and a captain [\*709] and pilot of competent skill.” It is not necessary for \* the defendant to contend that the want of a passport in this case would have been a good ground of confiscation: it is enough if it subjected the ship to certain interruptions and detentions in her voyage, to which according to the terms of the contract she should not have been subject. The defendant had a right to expect that the ship should sail having everything on board to prevent her being rightfully stopped, and carried into an enemy’s port. The circumstance of the ship’s having this paper on board after she sailed from Guernsey is perfectly immaterial; because the warranty extended during the whole voyage, and her not having this passport when she sailed was a non-compliance with the warranty. The case of *Barzillay v. Lewis*, Park’s Insur. 410, is a strong authority in favour of the defendant; for there, though the ship which was warranted Dutch property was Dutch property, yet as she had not on board such a passport as was required by the regulations of France, it was holden that the assured could not recover.

Lord KENYON, Ch. J.—Notwithstanding a wish has been expressed<sup>1</sup> that there may be a second argument in this case, I cannot forbear saying what occurs to me at present on this

<sup>1</sup> During the argument, the parties expressed a wish to have the case argued again.

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subject. On the trial I gave my opinion strongly in favour of the defendant, and I have no reluctance in saying I continue of the same opinion. This was an insurance from London to Guernsey, from thence to the coast of Africa, and during her trade there, and from thence to the West Indies. Now nothing can be clearer than this, that if a ship that is insured be not seaworthy, or in a proper condition for sailing during any part of the voyage, nothing that happens afterwards can better her original situation. By the treaty between France and America, referred to in the case, it is agreed that the ships and vessels belonging to the subjects of either ally must be furnished with sea-letters or passports, &c. Now I think that the warranty in this policy, that the ship was American property, is not satisfied by merely showing that in fact the ship was American property. When these parties entered into the contract of insurance, the underwriter was to be indemnified to a certain extent under this warranty; the ship was not only not to be liable to risks arising from her not being American property, but she was not to be liable to any inconveniences or impediment in her voyage from her not being in the condition required by the treaty with France.

\*The question here is whether or not this ship was in [\*710] such a situation as to be entitled, in the words of the defendant's counsel, to all the privileges of an American flag; I think she was not. It is true perhaps that the French had no right to confiscate the ship for not having the passport on board, if in fact it were proved that she was an American ship; but under the terms of this treaty the French had a right to do certain acts which they could not have done according to the treaty if the passport had been on board. If the passport were on board, the French ships were not to come within cannon-shot, nor to chase or drive her out of her voyage, and they were not to send more than two or three men on board; which negative implies an affirmative, that in case she had no passport on board, the French would not have been guilty of any infraction of the treaty if they had forced the ship out of her voyage. The parties to this contract of assurance meant that the underwriter should not be liable to such risks; but the ship was subject to these risks and inconveniences through the neglect of the assured, because he did not do all that was required by the treaty. Might not this ship have been carried into a French port and the voyage

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been thereby delayed for want of this passport, though perhaps ultimately she would not have been liable to confiscation? And is not that a greater risk than the underwriter engaged to insure in the case of a ship warranted American? It is true that the loss did not happen in consequence of the ship not having a passport, but still the underwriter was thereby put to greater risk than he would have been, if the ship had had this document on board. I am therefore of opinion, as at present advised, that the plaintiff has no right to call on the underwriter.

ASHURST, J.—The warranty that the ship was American does not mean merely that the ship was American built, but that she was entitled to all the privileges and indemnities of an American ship, otherwise it makes a difference in the value of the risk; and in order to be entitled to these privileges she should have had a passport. The assured ought to disclose to the underwriter all the circumstances within his knowledge that may affect the *quantum* of the risk; now if the underwriter had been informed that this ship would not have any passport on board in the first part of the voyage from London to Guernsey, perhaps the underwriter would not have insured for the same premium. For this reason I think that the plaintiff is not entitled to recover in this action.

[\*711] \*GROSE, J.—Although this appears to be the first case of the kind, I think that the principle established in the cases of *De Hahn v. Hartley*, 1 T. R. 343 (p. 171, *post*), and *Bazzillay v. Lewis* must decide it. It was there holden that if a warranty be not strictly complied with the underwriter is discharged; and in the latter my Brother BULLER said, “The strongest grounds seems to be that she was warranted to be Dutch property, and yet had none of the documents necessary to protect a neutral ship consistent with the regulations of the Court of France.”

LAWRENCE, J.—It was taken for granted by the plaintiff's counsel that it must be considered by the finding of the jury that the warranty was complied with; but they have only found the fact that the ship was American property; it remains for the Court to explain the meaning of the warranty. Now if the meaning of the warranty be that the ship is entitled to all the privileges of an American flag, then this warranty was not complied with;

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and that seems to me the fair construction of the policy. Therefore I think the plaintiff is not entitled to recover.

*Judgment for the plaintiff nisi.*<sup>1</sup>

**Baring and others v. Clagett.**

3 Bos. & P. 201–218 (6 R. R. 759).

**Insurance.—Express Warranty.—Nationality of Ship.—Ship's Papers.**

Policy of insurance on a ship warranted American. To negative this [201] warranty, a sentence of condemnation of a French Court at St. Domingo was given in evidence, which began thus: “Condemnation of the English ship *Mount Vernon*. Extract from the books of the office of the provisional tribunal respecting prizes established at St. Domingo. We, F. P., Judge,” &c., and after stating that the circumstances of papers having been thrown overboard, the captain and supercargo having abandoned the ship, the captain being a Portuguese without a certificate of his naturalization, and the United States, in their last treaty with England, having suffered to be added to the articles which had before been considered as contraband of war, staves, &c., were sufficient motives to condemn the said ship, condemned the same as property belonging to the captor. *Held*, that this sentence was conclusive evidence that the ship was not American.

*Quere*, Whether if a ship be warranted American, the assured does thereby undertake that she shall be owned and navigated according to all the regulations of the American Navigation Act?

This was an action on a policy of insurance, dated the 18th of June, 1796, on twenty-five hogsheads of sugar, valued at £40 per hogshead, on board the *Mount Vernon*, “at and from Philadelphia to London, with liberty to touch at one port in the channel.” The premium was three guineas per cent, the ship being stated in the policy to be an “American ship.”

The cause was tried before Lord ALVANLEY, Ch. J., at the sittings after Trinity Term, 1801, when the jury found a verdict for the plaintiffs, damages £290 11s., subject to the opinion of the Court upon a case, stating that the *Mount Vernon* at the time the insurance was effected, when the ship sailed upon the voyage insured, and when she was afterwards captured, was the sole property of William Mayne Duncanson; that the said William Mayne Duncanson was born a British subject under the allegiance of the

<sup>1</sup> On a subsequent day in the term, of the Court so strongly against him, the plaintiff's counsel, finding the opinion declined having a second argument.

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King of Great Britain, had resided in the United States of America since the 22nd of August, 1794, but at none of the above periods was naturalized, or by the laws of the United States entitled to be naturalized as an American citizen, but that he was entitled to be, and was in fact naturalized as such in October, 1796 ; that the

*Mount Vernon* had formerly been the property of Thomas [\* 202] Murgatroyd, an American citizen, and that \* the following

are copies of the ship's register, and certificate of registry, in the form in which they existed when the ship sailed upon the voyage insured : [Here was introduced the original register of the *Mount Vernon*, in the name of Thomas Murgatroyd, owner, and John Cox, master, with a subsequent indorsement, stating George G. Dominick to have taken the oath required by law, and to be master in lieu of John Cox] ; that the destination of the ship was Cowes and a market, and that the plaintiffs were to direct to what market she should go ; that the property insured was on board at the time of the capture hereinafter mentioned, and the insured were interested therein to the amount of the sum insured ; that the ship sailed on the 2nd of June, 1796 ; that, together with the usual documents taken out by American vessels, she had on board the following passport : [Here was introduced the triplicate pass, the translation from the French of which, as far as respects the argument of this case, was as follows : “ To all who shall see these presents. Be it known that leave and permission has been granted to George G. Dominick, master or commander of the ship *Mount Vernon*, of the town of Philadelphia, of the burthen of 424 $\frac{2}{3}$  tons or thereabouts, being at present in the port of Philadelphia, and bound for Hamburgh, loaded with sundries per manifest,” &c.] ; that two hours after the pilot had been discharged, and as soon as the ship had sailed out of the river Delaware, she was boarded and taken possession of by the *Flying Fish*, an authorised cruiser of the Republic of France, and afterwards carried into the port of St. John in the Spanish island of Porto Rico ; that whilst remaining there the ship and cargo were libelled by the captors in the provisional tribunal of prizes at St. Domingo, being a Court of proper judicature established by the Republic of France for the determination of questions of prize ; that in the above Court a sentence was pronounced, the form of which is as follows :—

“ Thirteenth Fructidor (the 30th of August, fourth year). Condemnation of the English ship *Mount Vernon*. Extract from the

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books of the office of the provisional tribunal respecting prizes, established in St. Domingo. We, FRANCIS PONS, Judge of the provisional tribunal respecting prize established in St. Domingo, having looked over our sentence of the seventh Thermidor last, where all the papers exhibited by citizen Nadal, captain of the privateer *Flier*, against the ship *Mount Vernon*, are duly noticed, through which we had submitted the decision of this prize to the civil commission of Guarico, which \* applies again to our tri- [\* 203] bunal for pronouncing sentence on this subject ; having noticed also instructions which were officially given us by the citizen agent of the French Republic in this city, issued by the civil commission aforesaid in whose archives they have been duly recorded, from which it appears, first, that the papers having been thrown into the sea by the captain in sight of the privateer which captured him ; secondly, that the captain and supercargo having precipitately abandoned their ship in spite of the good treatment received by them from the French captain, and the hints he gave them about remaining there in order to plead their own cause, and thereby avoid her confiscation ; thirdly, the behaviour of the captured crew ; fourthly, the captain being a Portuguese without a certificate of his naturalization ; fifthly, that the United States, in the last treaty which they concluded with England, having suffered to be added to the articles which have been looked upon till at present as contraband of war, staves, tackles, sailcloth, iron hoops, and finally, all which can be made use of for vessels, are sufficient motives to condemn said ship ; after a serious examination we have judged and do judge that the ship *Mount Vernon*, Captain George Dominico, Portuguese, with her cargo, has been duly and justly captured by the French privateer commanded by citizen Nadal, to whom we adjudge her as property belonging to him, and of which he may dispose under the clauses and conditions made with his officers and crew, he being accountable for the duties of invalids and the costs of the tribunal, which he shall pay to the bearer of our notary's order. Santo Domingo, Fructidor thirteenth (August thirtieth). Fourth year of the French Republic, one and indivisible. Signed in the Register, PONS, Judge, and Despujeaux, Notary Public.

(Signed)

“ PONS, Judge.

“ DESPUJEAX, Notary.”

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That under this sentence of condemnation the *Mount Vernon* and her cargo were delivered up to the captors by the Spanish Governor of Porto Rico.<sup>1</sup>

[\*204] \* The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover?

[\*205] \* BAYLEY, Serjt., for the plaintiffs.—Three points I understand are to be insisted on for the defendant: 1st, that the warranty contained in the policy that the *Mount Vernon* was an American ship has not been complied with, because the owner of the *Mount Vernon* was not a naturalized American subject; 2ndly, that the *Mount Vernon* was not navigated as an American ship ought to be, the American Navigation Act requiring the captain to be a citizen of the United States, whereas G. G. Dominick was a Portuguese; and 3rdly, that the treaty between America and France has been infringed by the *Mount Vernon*, her passport not having truly described her intended voyage.

Most clearly the *Mount Vernon* was not entitled to the peculiar municipal privileges conferred on ships belonging to naturalized subjects of the United States, her owner not being a naturalized subject. But the meaning of the warranty is not that she was to be entitled to those privileges, but that according to the law of

nations and the treaties existing between America and [206] other countries she should be an American ship. The

terms of the American Navigation Act are, that ships not registered shall not “be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels.” The latter part of the sentence sufficiently explains the former, viz., that they shall not be deemed ships of the United States, with a view to particular privileges in the United States, though with a view to national privileges as against the rest of the world they remain as before that Act. This is further explained by the fact that ships of the United States pay a duty inwards of only six cents per ton, while ships not of the United States pay in some cases ten, in some thirty, cents per ton. In addition to which it may be observed, that by the American Navigation Act, if the property of a ship be altered she must

<sup>1</sup> At this part of the case were introduced several articles of the treaty between France and America, dated 6th February, 1773, and also several passages

from the American laws. The essential points arising from these documents sufficiently appear from the judgment.

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be registered anew, otherwise the ship shall cease to be deemed a vessel of the United States, and also that if the change of the master be not reported the register is void. Now suppose such a ship built within the United States, and owned by a naturalized subject of the United States, would she from the moment she incurred the forfeiture of her registry cease to be an American ship, and entitled to the protection of the American government? Though she ceases to be an American ship for certain purposes, it is most clear she does not become a ship of any other nation. An American subject is only thus far distinguishable from an American citizen, that the latter is entitled to privileges which the former is not; but both are equally entitled to the protection of the American government. Had America been at war with France, and Great Britain at peace with her, the *Mount Vernon* would have been a subject of prize to \*the cruisers of [\* 207] France, notwithstanding her owner was not a naturalized subject of the United States, and the British government could not have interfered in his favour, nor could she have been warranted British, for the domicile of her owner would have falsified such a warranty. The converse of the present case was decided by Lord KENYON in the case of *Tabbs v. Bendelack*.<sup>1</sup>

<sup>1</sup>*Tabbs v. Bendelack*. Sittings after Trinity Term, 1801, *coram* Lord KENYON, Guildhall.

This was an action on a policy of insurance on the freight of the ship *Franklin*, warranted American, at and from Liverpool to Naples or Sicily, with leave to discharge at Leghorn. The policy was dated the 29th of December, 1800. It appeared that the plaintiff was an American born, had resided in America, and had been employed in navigating vessels between this country and America; that having married in Liverpool, he had, from the year 1797, occupied a house there, in which his wife and children resided; that since that time he had once or twice navigated a ship from Liverpool to America, and back again, but that during the last war he had never been out of England, but had employed others to navigate his vessels to America and elsewhere, his family constantly residing at Liverpool; that in October, 1800, he had purchased the *Franklin*, which was an American ship, and regularly documented

as such from her owner, who was an American, and had brought her over from America; and that when the voyage to which the policy related should be completed, the plaintiff intended to return in her with his family to America. The action was brought in consequence of a loss by capture.

For the defendant it was objected that the warranty had not been complied with, inasmuch as the plaintiff was residing under and entitled to the protection of Great Britain, and had no right to set up his privileges as a citizen of America against the belligerent powers.

For the plaintiff it was insisted that his residence here was merely temporary, that he had the *an' mus revertendi*, and was therefore entitled to warrant his ship American.

Lord KENYON, Ch. J.—Whether the plaintiff has the intention of returning to America or not at a future period cannot affect the present question. In the policy he has warranted the ship *Franklin* to be American; from which warranty the un-

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[208] As to the second objection, that the *Mount Vernon* was not navigated according to the laws of America, the captain being a Portuguese, whereas he ought to have been a citizen of the United States, both the fact and the conclusion drawn from that fact may be denied. The fact is collected from the sentence of condemnation ; whereas that sentence only says that the captain was a Portuguese without a certificate of his naturalization. By the laws of the United States, previous to the Act passed in 1795, any person who had resided in America for two years was entitled to be naturalized. Now the sentence does not allege that he was not a citizen of America, but merely that he had not about him at the time of the capture the evidence of his being a citizen. But the treaty between America and France does not require that a foreigner who has acquired a citizenship in America should carry about him the certificate of his naturalization ; nor indeed, as between the two powers, is it necessary that the captain should be an American citizen, though in consequence of his not being so the ship is not entitled to the municipal privileges of a ship of the United States. [HEATH, J. By the 25th article of the treaty, the passport is to express the name and place of habitation of the master and commander of the ship. Now in the passport stated in the case, though the name of the master and commander is mentioned, his place of habitation does not seem to be stated ; for the words, "of the town of Philadelphia," immediately follow the name of the ship, and seem descriptive of the port to which she belongs.] Both the terms and the spirit of the treaty are satisfied if any part of the passport express the place of habitation of the commander.

derwriters collected that she was entitled to the privileges of an American ship. But whether the ship be entitled to those privileges or not does not depend merely upon her owner being an American born. Persons residing in this country, reaping the advantages of the trade of this country, and contributing to the well-being of this country, must for the purposes of trade be considered as belonging to this country. By the law of nations, therefore, the property of such a person is liable to capture by belligerents, on the ground of such property belonging to a subject of this country. That rule of law was acted upon in the Saint Eustatia

cases at the Cockpit, when Lord CAMDEN, and some of the greatest persons that ever adorned the law of this country, presided there. In the case of the *Argonaut* (*Wilson v. Murrayatt*, 8 T. R. 31, also 1 Bos. & P., p. 430), though we were of opinion that Collett, being a native of this country, could not put off his allegiance to it, but might be guilty of high treason against the State, yet we thought that being domiciled in America he was entitled to the privileges of an American. The plaintiff was nonsuited.

The Attorney-General (Law), ERSKINE, PARK, and GASELEE, for the plaintiff  
GARROW and GIBBS, for the defendant.

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The third objection taken is, that the passport has not [209] truly described the destination of the ship. It is necessary to observe, that by the treaty it is not required that the passport should express the place of destination, but that the certificate of clearance should express it. Now it is stated in the case that the *Mount Vernon* had “the usual documents taken out by American ships;” it must be presumed, therefore, that her certificate of clearance was regular. It is only incumbent on me to contend that the destination of the ship stated in the passport was introduced *bonâ fide*, and not with a view to mislead the cruisers of the belligerent powers. It happened that when the ship sailed, part of her cargo was not admissible into the ports of Great Britain, and if that inadmissibility had continued to the time of her arrival at Cowes, Hamburgh would have been the market to which she would have gone. At the time of her sailing, therefore, her port of discharge was not decided upon, but was left to the discretion of the house of Baring & Co. Previous to her arrival at Cowes, an Act of Parliament had passed allowing the importation of the commodity before prohibited, provided an order of council could be obtained for that purpose; whereupon the house of Baring & Co. decided that London should be her port of discharge. Hamburgh, therefore, being the most probable place of destination at the time she sailed on her voyage, that place was mentioned in the passport as her place of destination.

\* Best, Serjt., *contra*.—The *Mount Vernon* being war- [\*210] ranted to be an American ship, must in every sense of that description be completely American, and be furnished with all the documents of an American ship, or the warranty is not fulfilled. It is not necessary to deny, as a general proposition, that for the purposes of trade a man must be considered to be of that country where he happens to be domiciled. But to that general proposition must be added this qualification, that the universal practice of nations on this point may be varied by the particular regulations of any individual State, as far as respects that State, and the subjects of that State. Every nation has a right to say upon what terms foreigners shall be allowed to be naturalized among them, or otherwise become entitled to the protection of the State; and they have a right also to direct that the property as well as the persons of foreigners coming to reside amongst them shall have complied with certain stipulated forms before

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it shall be deemed to be the property of the member of such a State. Upon this principle America has acted in passing the Naturalization Act and the American Navigation Act. It is clear that the *Mount Vernon* was not that kind of ship to which alone the American government has extended the privileges of American protection.

[211] The sentence of condemnation completely supports the second objection, viz., that the captain was not a citizen of the United States; for, after alleging among the reasons of condemnation, "the captain being a Portuguese without a certificate of his naturalization," it proceeds in the adjudicating part to condemn after "a serious examination" (that is, of all the facts previously alleged) "the ship *Mount Vernon*, captain George Dominico, Portuguese." Consistently, therefore, with all the decisions upon the effect of foreign sentences, and particularly with the doctrine lately laid down at the Cockpit in the case of *Kindersley v. Chase*, Park, 363 (o), ed. 5, it is not competent to the plaintiffs to dispute the fact of the captain being a Portuguese. For if a sentence state several facts sufficient to legalise condemnation, and then proceed to condemn generally, the facts stated in the sentence are conclusive and cannot be controverted. But in this case the Court have alleged in the adjudicating part of the sentence that the captain was a Portuguese, which precludes any argument upon the point. It is observable, also, that the title of the sentence of condemnation is not of an American ship, but "of the English ship *Mount Vernon*."

But, thirdly, the ship's papers are not such as the treaty between America and France requires; consequently in that respect the warranty is not fulfilled. These papers represent the ship

[212] as proceeding to a neutral port, when in fact she was proceeding to the port of a belligerent. It is not necessary to insist that this would have been good ground of condemnation, for if it would have justified detention only, the underwriter is discharged. *Rich v. Purker*, 7 T. R. 705 (p. 149, *ante*). If it be argued that the passport need not have noticed her destination, and that possibly her certificate of clearance is correct in the statement of the destination, still there must in that case be a discordancy among the ship's papers, which of itself would induce the cruisers of France to detain her for examination.

Bayley, in reply, observed, that whatever the title of the sen-

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tence might be, the sentence itself did not profess to condemn on the ground of the *Mount Vernon* being an English ship, and therefore the title could have no effect whatever. He added, that the fifth reason stated in the sentence nearly amounted to a declaration of war with America, and evidenced most strongly that she was condemned for being an American; the United States having at that time displeased France by their treaty with Great Britain.

*Cur. adv. vult.*

On this day the opinion of the Court was delivered by Lord ALVANLEY, Ch. J., who, after stating the case, proceeded thus: The first class of objections to the plaintiff's recovery in this case which I shall consider arises from the supposed non-compliance with the treaty between America and France. That treaty requires that in case either of the parties to the treaty shall be engaged in war, the ships and vessels belonging to the subjects or people of the other must be furnished with a sea-letter or passport expressing the name, property, and bulk of the ship, and also the name and place of habitation of the master or commander of the ship. Now in the passport stated in this case, the name of the master is undoubtedly set forth; but I think it would be a strange perversion of the construction of language to hold that the words "of the town of Philadelphia," which immediately follow the name of the ship, are applicable to the master, and descriptive of his habitation, and not of the port to which the ship belonged. If, \* therefore, there was not a [\* 213] general admission that the ship, "together with the usual documents taken out by American vessels," had the passport stated, I should have been of opinion that the treaty had not in this respect been sufficiently complied with; but I think from that general admission we are at liberty to presume that she had on board a sea-letter, expressing the name and place of abode of the master, and consequently that in this respect she did not violate the treaty between America and France. The same presumption may also be made in favour of the plaintiffs, with respect to the objection taken, that the passport did not truly describe the destination of the ship; for though in the passport it is alleged that she was bound for Hamburg, whereas her instructions were to go to Cowes and a market, yet the latter destination may possibly have appeared upon the title of clearance, which we

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must suppose her to have had among the other documents usually taken out by American vessels. The next consideration is, whether this ship was so owned and commanded as to have entitled herself to the privileges of an American ship, and thereby have complied with the warranty? It is insisted on the part of the plaintiffs that the non-compliance with the regulations of the American Navigation Act, although it may deprive the owners of the ship of certain municipal benefits, cannot affect the warranty; for that if the owner be really and *bonâ fide* a domiciled inhabitant of America, his ship thereby becomes an American ship within the meaning of the treaty between France and America. I am very far from thinking that such is the true construction of that treaty. The words of the Navigation Act are, that "no ships or vessels shall be denominated and deemed ships or vessels of the United States, and entitled to the benefits and privileges appertaining to such ships or vessels, unless they comply with the regulations of the Navigation Act." It has been argued that the Americans possibly may have the same sort of distinction with respect to ships registered and not registered as we have, and although the latter may not be entitled to some particular municipal privileges, yet that they are entitled to the protection of the American government. It does appear to me, however, that the privilege of carrying the American flag as a safe-conduct among belligerent powers is one of those privileges intended to be denied to all ships but those which have complied with the regulations of the American Navigation Act. It is admitted

that the owner of the *Mount Vernon* not having been [\* 214] \* naturalized in America, his ship had not acquired the privileges conferred upon ships by the Navigation Act; and I do not perceive enough stated upon the case to satisfy me that the French had not a right to say that they were only obliged to respect as vessels of the United States those vessels which the legislature of America had resolved should exclusively be deemed and denominated vessels of the United States. The next subject of consideration in this case is the sentence of condemnation. Like other French sentences it states many reasons, but draws no consequences from those reasons; and though several facts are stated, as if leading either to the conclusion that the *Mount Vernon* was enemies' property, or that she had not complied with some conditions requisite to establish her claim to the privileges of

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neutrality, yet the only conclusion at last drawn from these premises is, that the ship belongs to the captors as prize. If the words prefixed to this sentence, viz., "Condemnation of the English ship *Mount Vernon*," are to be deemed part of the sentence, they are of themselves imperative upon us to hold that the warranty has not been complied with. These words, however, are followed by this expression, "Extract from the books of the office of the provisional tribunal respecting prizes established in Saint Domingo," and then the sentence is stated at length. It has been argued that the fourth reason stated in the sentence is not a direct allegation that the captain was a Portuguese, but only that he had not about him at the time of the capture the evidence of his having been naturalized. I think, however, the allegation as it now stands, coupled with what is stated in the adjudicating part of the sentence, viz., that "the said ship *Mount Vernon*, captain George Dominico, Portuguese, has been duly and justly captured," sufficiently establish that he was a Portuguese, and not a citizen of the United States. Now I think it was essential to the character of an American ship that the captain should, according to the regulations of the American Navigation Act, have been a citizen of the United States. It is unnecessary for us at this time of day to deliver any opinion respecting the admissibility of sentences of condemnation, as operating against the rights of third persons, strangers to the suit. On that point doubts have been entertained by very great authorities; but consistently with the case of *Hughes v. Cornelius*, 2 Show. 232, and a long series of determinations in Westminster Hall, we must hold them to be admissible and conclusive between

\* the assured and the underwriter, with respect to every [\* 215] fact which they profess to decide. *Diet. per Le Blanc*, J., 8 T. R. 444 (5 R. R. 415). If, indeed, it had appeared that the sentence proceeded, not upon a falsification of the warranty contained in the policy, but upon some positive regulations of France, adopted without the assent of other nations, and contrary to the law of nations, the assured would still have been at liberty to prove his neutrality. No question can now arise as to the effect of such a warranty as the present; for I take it to be completely established by the cases of *Barzillay v. Lewis*, Park Insur. 359, *Geyer v. Aguirre*, 7 T. R. 681 (4 R. R. 543), and *Rich v. Parker*, 7 T. R. 705 (p. 149, *ante*), that if a ship be warranted

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American, she must not only belong to an American, but must in every respect be so documented as to entitle herself during the whole of her voyage to the privileges of the American flag. It was once doubted, indeed, by Lord KENYON in the case of *De Souza v. Ewer*, Park Insur. 361, whether the mere fact of condemnation as prize was not of itself conclusive against the warranty of neutrality, though special grounds of condemnation appeared upon the sentence not warranted by the law of nations; for it was considered that a contrary doctrine would impute bad faith to the tribunal by which the condemnation was pronounced; and unless such special grounds appear, the sentence is undoubtedly conclusive. Accordingly in *Saloucci v. Woodmass*, Park Insur. 362, where a ship warranted neutral was condemned as good and lawful prize, that single allegation in the sentence was deemed sufficient to negative the neutrality of the ship, because, as no special ground of condemnation appeared, the Court held themselves bound to suppose that it proceeded upon the just and lawful ground of the ship being enemies' property. But in *Bernardi v. Motteau*, Doug. 574, the Court considered the sentence conclusive as to everything which it professed to decide, yet held themselves at liberty to examine whether the ground on which the sentence proceeded actually falsified the warranty contained in the policy. Then follows a series of authorities in which the Courts have determined that if the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of [\* 216] Europe \* have been made parties, such a condemnation shall not be admitted as conclusive against the warranty of neutrality. Such was the doctrine laid down in *Mayne v. Walter*, Park Insur. 363, and confirmed in the subsequent cases of *Pollard v. Bell*, 8 R. T. 434 (5 R. R. 404), and *Bird v. Appleton*, 8 T. R. 562 (5 R. R. 468). The late case of *Price v. Bell*, 1 East, 663, is extremely like the present, and, indeed, if it were not for the words prefixed to the sentence in this case, there would be as much analogy as possible between the two cases. The sentences there proceeded upon much the same ground as the present sentence; and the Court of King's Bench was of opinion that

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there was nothing sufficiently conclusive upon the face of the sentence to negative the neutrality, the condemnation apparently proceeding upon reasons which were not justifiable. The last case to which I shall advert is that of *Kindersley v. Chase*, decided at the Cockpit, July 21, 1801, on appeal from the Mayor's Court at Madras, and reported in Park's Insur. p. 363 (o), ed. 5. The judgment of the Court was there pronounced by the present Master of the Rolls in a very able manner, who, after considering the conclusiveness of foreign sentences upon warranties of neutrality and acquiescing in most of the principles laid down in our Courts, proceeded to discuss the particular sentence upon which that case came before the council. He there adopted a principle most essential to be attended to in the construction of foreign sentences; namely, that the reasons stated in those sentences are not always to be considered as of themselves the grounds upon which the condemnation proceeds, but as the *media* of proof from whence a presumption may be drawn that the ship is or is not lawful prize. We are called upon, therefore, to consider what construction we ought to put upon the sentence of condemnation stated in this case. The question will be, Whether on the face of that sentence sufficient appears to show that the *Mount Vernon* was condemned by the French Court, not on the ground of her being enemies' property, but because she had contravened some arbitrary edict of France, or not conformed to some regulation to which she was not bound to conform; or whether, on the other hand, taking the whole of the sentence together, we are not under the necessity of holding, as was holden in the case of *Kindersley v. Chase*, that it must be construed fairly in favour of the underwriters, and we must conclude that it proceeded on the ground of the ship being enemies' property, unless the contrary distinctly appear? In the body of \*the sen- [\*217] tence there is nothing to show that it proceeded on the want of any particular document, or non-compliance with any particular edict. In every country but our own, throwing papers overboard has, I believe, been holden to be sufficient cause of condemnation; though I am not sure whether in France that rule has been so laid down by way of positive institution, or only as a mode of evidence from which the conclusion is to be drawn that the ship is enemies' property. Indeed, in England that circumstance alone has often been deemed sufficient to

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warrant the same conclusion. Another reason stated in the sentence is, that the crew ran away and refused to be examined. Now we all know that by the law of England, and I believe by the law of nations, it is incumbent upon the crew of a captured ship to submit to examination; and if they do not, everything hostile may be presumed against them. Nobody, therefore, can say that this was not one of the grounds from which the French Court drew the conclusion that the ship was enemies' property. Then comes the last reason stated in the sentence, which I confess has raised considerable doubts in my mind as to the propriety of the sentence. I did think that notwithstanding all the reasons previously stated, it might be fairly argued that the sentence proceeded upon the last reason only, and was a declaration of war against America, considering America as having granted to England improper privileges. If this be so, the assured have a right to say that the *Mount Vernon* was condemned, not because she was not an American, but because she was an American. If, therefore, the title prefixed to this sentence was not to be considered as part of the sentence, I should very much doubt whether there were sufficient on the face of the sentence to warrant the conclusion that the ship was condemned on the ground of her being English: but if it be part of the sentence, then the last reason stated is very material with respect to the consideration whether the ship were English or not; for it was not unnatural for the French Court to couple with the other circumstances stated in the sentence the favourable disposition of America towards England, and the readiness to furnish the English with such documents as would entitle them to the privileges of the American flag. If, therefore, the last reason be not considered with reference to the title, that reason of itself, unconnected with the consideration whether the ship was English or not, might be deemed the real ground of the condemnation, and then

the underwriters would unquestionably be liable. But  
[\* 218] coupling this title with the \* objections taken to the  
ship's papers, and the regulations by treaty between  
America and France, and considering that it makes no difference  
whether the ground on which the ship was condemned appear at  
the beginning or the conclusion of the sentence, I am of opinion,  
and my Brothers concur with me for all or some of these reasons,  
that the *Mount Vernon* was condemned either as not being an

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American, or for not having those documents which entitled her to the privileges of the American flag in the Court of a belligerent power, or for the misconduct of the captain and the crew. The *postea* therefore must be delivered to the defendant.

PER CURIAM.

*Postea to the defendant.*

## ENGLISH NOTES.

The point which frequently arises in this class of cases, where the nationality of a ship is in question, namely, whether the sentence of condemnation by Prize Courts is conclusive between the insurer and insured, has given rise to much discussion. The cases are commented on in the judgment delivered by BLACKBURN, J. (on the part of himself and other Judges), in answer to questions of the Lords in the case of *Castrique v. Imrie* (No. 14 of "Conflict of Laws," 5 R. C., at p. 912). The rule which has become settled in insurance law is that if the sentence of condemnation expressly proceeded on the ground of the nationality, it is conclusive as to the nationality in an insurance question. The rule, although admitted to be anomalous and contrary to the general principles of evidence, has been held to be too well established in insurance law to be disturbed. The observations of Lord ELDON referred to in the above-mentioned opinion of BLACKBURN, J., upon this rule (3 Bos. & P. 545, 7 R. R. 879) may here be cited at length. He says: "The practice of receiving those sentences as conclusive evidence for collateral purposes, and not merely in suits between the identical parties in the foreign Courts, may possibly have first obtained in those cases where the plaintiff himself produced the sentence in order to prove the loss; and I have reason to believe that the practice of allowing the underwriters to make use of them was founded on a notion that every man might come into a Court of Admiralty *pro interesse suo*, and that all mankind, therefore, were virtually parties to such proceedings. That notion, I apprehend and am informed, is a mistaken notion, and that the assured in a policy of assurance, with a warranty of neutral character, could not be admitted parties to the proceedings in a Court of Admiralty for such collateral purposes as those for which they must of course claim to be admitted. It does not become me, however, for that reason, now to impugn a practice acted upon for so long a series of years, and that by men whose judicial character must ever be looked up to with reverence in this country. I well know, also, how much property has been affected by this principle, and how much more may now be afloat on the faith of that long train of decisions in Westminster Hall, by which the principle in question has been sanctioned. There is, indeed, another class of cases arising out of foreign sentences, in which

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the conduct of the French courts, regulated as it has been by the ordinances of that country, has met with no small degree of reprobation, and where the Judges of our Courts have held, that unless the adjudication by which the property in question is condemned be expressly declared to proceed on the ground of the property belonging to enemies, they are at liberty to examine the propriety of such sentence. Of that class of cases I will only say that they have not yet, from their antiquity, acquired that stability which can operate to preclude us from fully examining the principles upon which they have proceeded. In the event of such examination taking place, the question would be, Whether such sentences of condemnation must not be presumed to have been founded on the only legitimate ground on which they can be founded, viz., the property not being neutral but hostile? and, Whether we are ever at liberty to say that the decisions of these Courts are not consistent with the law of nations? I think I should feel myself under great difficulty, if called upon, to admit the authority of some of the decisions upon these sentences."

The point actually decided in *Lothian v. Henderson* (H. L. 1803), 3 Bos. & P. 499, 7 R. R. 829, was that the rule may be excluded by an express stipulation in the policy as to the evidence which shall be required to prove the nationality.

Another class of cases relating to the loss by capture of a ship for want of proper documents—the want of documents being treated as the primary cause of the loss—will be dealt with hereafter. See *Bell v. Carstairs*, No. 77, p. 319, *post*.

#### AMERICAN NOTES.

Both these cases are cited in Parsons on Marine Insurance.

The first branch of the Rule is exactly sustained by *Higgins v. Livermore*, 14 Massachusetts, 106; *Lewis v. Thatcher*, 15 ibid. 432; *Barker v. Phoenix Ins. Co.*, 8 Johnson (N. Y.), 307; 5 Am. Dec. 339.

The words "British brig," even if a warranty, did not imply British registry, but only British ownership. *Mackie v. Pleasants*, 5 Binney (Penn.). 363.

A warranty that a ship is American imports also that she has the documents requisite to show her national character: *Barker v. Phoenix Ins. Co.*, 8 Johnson (N. Y.), 307; 5 Am. Dec. 339; but a sea-letter dispensed with the register. KENT, Ch. J., said: "What was said by Lord ALVANLEY in *Baring v. Clagett* (3 Bos. & Pull. 201) is not applicable, nor does it affect this doctrine. He considered that the warranty of a ship to be American required an American register, under our Navigation Act and the French treaty, and that the privilege of carrying the American flag, as a safe conduct among belligerent powers, was to be denied to all ships not sailing under a compliance with that Act. The Act he referred to was passed in

No. 64.—*De Hahn v. Hartley*, 1 T. R. 343.—Rule.

1792 (Laws (N. S.), Vol. 2, p. 131), and declared that none but registered vessels should be deemed vessels of the United States entitled to the benefits and privileges appertaining to such vessels. He was not then apprised of the distinction between registered and unregistered vessels, and of the legislative recognition of the latter as American vessels, entitled to privileges in port, as such, under the Act of 1802. The Act of 1792, to which he referred, seems, by its terms, to have left unregistered vessels as alien vessels, and without the protection of the United States. Whether that was, or was not, the condition of such vessels at that time, is not now a material inquiry, since the vessel in question, at the time of the warranty, was not only American property in fact, but entitled, by her sea-letter, under our law, and under the law of nations, to the immunities of the American flag. This was equivalent to what was termed by Sir William Scott a national pass, and so it was considered in the Court of Errors, in the case of *Sleight v. Hartshorne* (2 Johns. Rep. 531)."

But in the absence of any warranty of national character the absence of a sea-letter is immaterial. *Elting v. Scott*, 2 Johnson (N. Y.), 157.

No. 64.—DE HAHN *v.* HARTLEY.

(1786.)

## RULE.

A STATEMENT written in the margin of the policy is a warranty,—in the sense of an essential condition,—and, in order to make the insurer liable, must be strictly complied with.

***De Hahn v. Hartley.***

1 T. R. 343-346; 2 T. R. 186 (1 R. R. 221).

*Insurance.—Express Warranty.*

Whatever is written in the margin of a policy of insurance is a warranty, [343] and must be literally complied with.

This was an action upon promises brought by the plaintiff (an underwriter) to recover back the amount of a loss which he had paid upon a policy of insurance.

Plea, the general issue.

The cause was tried before BULLER, J., at the sittings after last Easter Term at Guildhall, when the jury found a special verdict; which stated:—

No. 64.—*De Hahn v. Hartley, 1 T. R. 343, 344.*

That the defendant on the 14th June, 1779, at London, gave to one Alexander Anderson, then being an insurance broker, certain instructions in writing to cause an insurance to be made on a certain ship or vessel called the *Juno*, which were in the words and figures following: “Please get £2000 insured on goods as interest may appear; slaves valued at £30 per head; comwood, £40 per ton; ivory, £20 per hundred weight; gum copal, £5 per pound; at and from Africa to her discharging port or ports in the British West Indies; warranted copper-sheathed, and sailed from Liverpool with 14 six-pounders (exclusive of swivels, &c.), 50 hands or upwards, at 12, not exceeding 15, guineas. *Juno—Beaver.* S. Hartley and Company, June 14th, 1779.”

That the said Alexander Anderson, in consequence of the said written instructions from the said defendant on the said [\*344] 14th \* June, 1779, at London aforesaid, &c., did cause a certain writing or policy of assurance to be made on the said ship or vessel called the *Juno* in the words and figures following (reciting the policy), which was upon any kind of goods and merchandises, and also upon the body, tackle, apparel, &c., of and in the ship *Juno*, at and from Africa to her port or ports of discharge in the British West Indies, at and after the rate of £15 per cent.

The verdict, after reciting two memoranda, which are not material, then proceeded to state that in the margin of the said policy were written the words and figures following: “Sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards; copper-sheathed.”

That on the said 14th June, 1779, and not before, at London aforesaid, &c., the plaintiff underwrote the said policy for the sum of £200, and received a premium of £31 10s. 0d. as the consideration thereof.

That the said ship or vessel called the *Juno* sailed from Liverpool aforesaid on the 13th October, 1778, having then only 46 hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after her sailing from Liverpool as aforesaid, with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and that at Beaumaris aforesaid the said ship or vessel took in six hands more, and then had, and during the said voyage until the capture thereof hereinafter mentioned continued to have, 52 hands on board her.

No. 64.—**De Hahn v. Hartley, 1 T. R. 344, 345.**

That the said ship or vessel in the said voyage from Liverpool aforesaid to Beaumaris aforesaid, until and when she took in the said six additional hands, was equally safe as if she had had 50 hands on board her for that part of the said voyage.

That divers goods, wares, and merchandises of the said defendant, of great value, were laden and put on board the said ship or vessel, and remained on board her until and at the time of the capture thereof hereinafter mentioned. And that on the 14th March, 1779, the said ship or vessel, while she remained on the coast of Africa, and before her sailing for her port of discharge in the British West India Islands, was, upon the high seas, with the said goods, wares, and merchandises on board her as aforesaid, met with by certain enemies of our lord the now King, and captured by them, &c., and thereby all the said goods, wares, and merchandises \* of the said defendant, so laden on board her as aforesaid, [\*345] were wholly lost to him.

That when the said plaintiff received an account of the said loss of the said ship or vessel, he paid to the said defendant the said sum of £200 so insured by him as aforesaid, not having then had any notice that the said ship or vessel had only 46 hands on board her when she sailed from Liverpool as aforesaid. But whether upon the whole matter, &c.

Law, for the plaintiff, was stopped by the Court.

Wood, for the defendant, admitted that a marginal note in a policy of insurance may be a warranty, but contended that this was distinguishable from the case of *Bean v. Stupart*, Doug. 11, and all the other cases on the subject. In the cases decided, it has always been a warranty of a fact relating to the voyage insured; but in the present case, that which is written in the margin has no relation whatever to the voyage, for it relates merely to the force of the ship at Liverpool, before the voyage commenced, and is totally unconnected with the risk insured. The insurance is "at and from Africa to her port of discharge in the British West Indies;" and the warranty is from Liverpool; which is antecedent to the voyage insured, and is merely a representation of the state of the ship when she set out on her voyage from Liverpool. Then if it be only a representation, it is immaterial whether complied with or not, because it is found by the verdict that the ship was equally safe with the number of hands she had on board, as if she had had the whole number contained in

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the warranty. The warranty, then, can only relate to her being copper-sheathed: that part, indeed, was extremely material, because otherwise the risk would have been considerably increased; and that extended to the voyage insured: but the other part of the marginal note was merely a representation, because the manner of sailing from Liverpool was unconnected with the risk insured.

But even if the Court should consider the whole as a warranty, it has been substantially complied with.

Lord MANSFIELD, Ch. J.—There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2nd, the warranty

would not be complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with. Now in the present case the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

ASHHURST, J.—The very meaning of a warranty is to preclude all questions whether it has been substantially complied with: it must be literally so.

BULLER, J.—It is impossible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout.

*Judgment for the plaintiff.*

[2 T. R. 186] This judgment was subsequently unanimously affirmed in the Exchequer Chamber.

#### ENGLISH NOTES.

As an instance of the necessity for literal compliance with a warranty to sail on or before a certain day, may be mentioned *Hore v. Whitmore* (1778), 2 Cowp. 784. So where the warranty was to sail after a certain day. *Vezian v. Grant*, 1 Marshall Insur.; 2 Park Insur.; Arnould, 6th ed., p. 609. Compare *Cruickshank v. Janson* (1810), 2 Taunt. 301, 11 R. R. 584, where a vessel insured at and from Jamaica to London,

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warranted to sail after 12th of January, was held protected in coasting from port to port in the island before the 12th of January, that being within the words “at Jamaica,” and not sailing on the voyage insured.

Whether a vessel has “sailed” at a given time is a question of fact and intention. If the ship, being ready for the voyage, has quitted her moorings and moved away with the intention of at once going on her voyage, she is considered to have sailed, although she may, by reason of some unforeseen contingency, be again anchored and detained in or at the port or place, before finally going on her way. But if she has merely left her moorings, in an imperfect state of preparation for the voyage, intending to complete her preparation and finally set sail for another point, which she does not accomplish before the time limited, this is not a sailing within the warranty. *Bond v. Nutt* (1777), 2 Cowp. 608; *Thellusson v. Fergusson* (1780), 1 Dougl. 361; *Earle v. Harris* (1780), 1 Dougl. 357; *Wright v. Shiffner* (1809), 11 East, 515, 2 Camp. 247, 11 R. R. 263; *Ridsdale v. Newnham* (1815), 4 Camp. 111, 3 M. & S. 456, 16 R. R. 327; *Pettegrew v. Pringle* (1832), 3 B. & Ad. 514; *Graham v. Barras* (1834), 5 B. & Ad. 1011.

A vessel cannot be said to have “sailed” unless she has actually quitted her moorings. *Nelson v. Salvador* (1829), Moody & Malkin, 309, 31 R. R. 733.

A case very near the dividing line, both as to fact and intention, was that of *Cochrane v. Fisher* (1834, 1835), 2 Cr. & M. 581 (Ex. Ch. in error), 1 Cr. M. & R. 809. The ship was insured on a time-policy with a warranty “not to sail for British North America after the 15th of August.” The vessel, on the morning of the 15th of August, was cleared at the Custom-house of Dublin, and ready for sea. She was then lying in the Custom-house dock, which opens into the river Liffey, which forms part of Dublin Harbour. She was afterwards, on the same day, hauled out of dock into the river, for the purpose of proceeding on her voyage to Quebec. The wind blew up the river, and it was manifestly impossible for the ship to get out of harbour. She was warped down the river about half a mile, and took the ground as the tide ebbed. She was unable to get out until the 17th, when the wind and tide were favourable. She then got to sea and arrived safely at Quebec, after which she was lost on the homeward voyage. There was a verdict for the plaintiff subject to a case which stated the above facts, and also stated as follows: “The master and crew fully intended to sail for Quebec on the 15th of August, if it had been possible, and did all they could, and used every means and exertion to do so, and got the vessel out of dock and warped her down the river as far as the depth of water enabled them, as before stated. But at the time the vessel quitted the dock, they knew it was impossible to get to sea that

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day." The Judges of the Court of Exchequer considered that the question whether the warranty was complied with turned upon the intention of the captain, which was not sufficiently stated in the case, and that if the vessel was taken out of dock and warped down the river merely and solely for the purpose of complying with the letter of the warranty, it was not a compliance with the warranty; but that if the motive were mixed, and the intention was also to place the ship in a more favourable situation for the prosecution of the voyage, the warranty was complied with. They ordered a new trial for the purpose of ascertaining the intention. On the new trial, in addition to the facts found in the former case, the jury found "that the master and crew, by hauling out of dock and warping down the river, intended to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty, but that at the time when the said vessel quitted the dock, they knew it was impossible to get to sea that day." Upon this verdict the Court of Exchequer gave judgment for the plaintiff. This judgment was affirmed by the Exchequer Chamber. FENMAN, Ch. J., in delivering the judgment of the Court, did not go into any nice question as to the motive, but stated broadly the opinion that the vessel, in going out of dock and warping down the river, was in the prosecution of her voyage, and consequently the warranty was complied with.

Where, however, the voyage commences with a river passage of considerable length, on which it is customary and convenient to enter in a state of preparation different from that required for the sea voyage, the ship starting on the river passage in the usual, and a sufficient, state of preparation, is said to have sailed on the voyage, although something remains to be done (by completion of crew or otherwise) to make her seaworthy for the sea voyage. *Bouillon v. Lupton* (1863), 15 C. B. (N. S.) 113, 33 L. J. C. P. 37, 10 Jur. (N. S.) 422, 8 L. T. 575, 11 W. R. 966, *ante*, p. 72. So in *Picard v. Shepherd* (1866), 14 Moore P. C. 471, 5 L. T. 504, 10 W. R. 136, where the question was as to the implied warranty of seaworthiness.

The construction of a warranty to "sail from," which has been held the same as a warranty to "depart," has been construed to mean that the vessel must be out of the port and at sea by the time named. *Moir v. Royal Exchange Assurance Co.* (1815), 3 M. & S. 461, 4 Camp. 84, 6 Taunt. 241, 16 R. R. 338; *Lang v. Anderdon* (1824), 3 B. & C. 495, 27 R. R. 412.

A peculiar construction of a warranty was adopted, from the necessity of the circumstances, in the case of *Baines v. Holland* (1855), 8 Ex. 802, 24 L. J. Ex. 204. The insurance was on ship "at and from New York to Quebec, during her stay there, and thence to the United King-

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dom; *the said ship being warranted* to sail from Quebec on or before the 1st November, 1853. The ship sailed from New York on the 15th of October, and was lost, after the 1st of November, on the voyage from New York to Quebec. It was held that the warranty could not be taken literally, otherwise the ship would be uninsured on the part of the voyage between New York and Quebec. It was construed to be only a stipulation that so far as relates to the voyage from Quebec to the United Kingdom, the underwriters are not responsible unless the ship sailed from Quebec on or before the 1st of November.

A warranty to depart with convoy is not satisfied unless the ship departs with convoy intended for the whole voyage. *Lilley v. Ewer* (1779), Dougl. 72; *Cohen v. Hinckley* (1808), 1 Taunt. 249. Nor is it satisfied if by reason of neglect on the part of the persons navigating the ship she fails to keep up with the convoy. See, per HOLT, Ch. J., and the majority in *Jeffery v. Legender* (1690), 3 Lev. 320; s. c. 1 Shower, 320. And see *Taylor v. Woodness*; *Hibbert v. Pigon*:—both cited in Park on Insurance. But the warranty is not broken by separation from the convoy through tempest or accident: *Jeffery v. Legender, supra*, and *Lilley v. Ewer, supra*, per Lord MANSFIELD; *Victorin v. Cleeve* (1746), 2 Str. 1250; and in that case the master may run for his port of discharge: *Audley v. Duff* (1800), 2 Bos. & P. 111, 5 R. R. 549. The departure with convoy from the appointed rendezvous satisfies the warranty, although the ship has sailed in the usual way, without convoy, from her port to the rendezvous. *Lethulier's Case* (1692), 2 Salk. 443; *Gordon v. Morley* (1747), 2 Str. 1265. And it is no deviation, although the rendezvous is not in the usual course of the prescribed voyage. *Bond v. Gonzales* (1704), 2 Salk. 445; *Warwick v. Scott* (1814), 4 Camp. 62. The warranty has been held satisfied by convoy intended for what is substantially the whole voyage; although the arrangements of the government left a small part of the voyage unprovided with convoy. *D'Eguino v. Bewicke* (1795), 2 H. Bl. 551, 3 R. R. 503.

A warranty of neutrality is satisfied if the property is neutral at the commencement of the risk: *Eden v. Parkinson* (1781), 1 Dougl. 732; *Tyson v. Gurney* (1789), 3 T. R. 477; provided the neutral character is not forfeited by the act of the insured: *Garrels v. Kensington* (1799), 8 T. R. 230, 4 R. R. 635. Cf. *Carruthers v. Gray* (1811–1812), 3 Camp. 142, 15 East, 35; *Dent v. Smith* (1869), L. R. 4 Q. B. 414, 38 L. J. Q. B. 144, 20 L. T. 868, 17 W. R. 646.

Where a time-policy on freight contained the clause, “Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise,” the ship pursuant to charter-party loaded a cargo and sailed, and on the following day her main shaft broke by reason of perils of the sea. She was towed back to the port of

No. 64.—*De Hahn v. Hartley*.—Notes.

loading, and it was there found that the delay necessary to repair the shaft would frustrate the object of the adventure, and the charterers under a clause in the charter-party determined the contract, and the shipowners lost the freight. *Held*, that the loss of freight was consequent on loss of time arising from a peril of the sea within the meaning of the warranty, and that the underwriters were not liable. *Bensaude v. Thames & Mersey Marine Insurance Co.* (C. A. 1896), 1897, 1 Q. B. 29, 66 L. J. Q. B. 45, 75 L. T. 405, 45 W. R. 114.

## AMERICAN NOTES.

This case is cited in 1 Parsons on Marine Insurance, p. 120, and in 1 Duer on Insurance, p. 141, and the doctrine is sustained by *Dennis v. Ludlow*, 2 Caines (N. Y.), 111 (words at bottom); *Duncan v. Sun F. Ins. Co.*, 6 Wendell (N. Y.), 488; 22 Am. Dec. 539; *Harris v. Eagle F. Ins. Co.*, 5 Johnson (N. Y.), 368 (memorandum on back, referred to in body of policy); *Guerlain v. Columbian Ins. Co.*, 7 Johnson (N. Y.), 526; *Ewer v. Washington Ins. Co.*, 16 Pickering (Mass.), 502; 28 Am. Dec. 258; *Wood v. Hartford F. Ins. Co.*, 13 Connecticut, 202; 33 Am. Dec. 395; *Pierce v. Charter Oak L. Ins. Co.*, 138 Massachusetts, 151; *McLaughlin v. Atlantic M. Ins. Co.*, 57 Maine, 170. The substance of these authorities is that marginal memoranda are a part of the contract, and as binding as if in the body of the policy.

The effect of indorsement on the policy to make a new contract is treated in *Northrup v. Miss. Valley Ins. Co.*, 47 Missouri, 435; 4 Am. Rep. 337, citing cases.

Not so however of the marginal entry, "Non-forfeiture endowment policy with profits." *McQuitty v. Cont. L. Ins. Co.*, 15 Rhode Island, 573. The Court observed: "There are cases which regarding these marginal catch-words as an element of the contract, hold that the policy, at least when converted into a 'paid-up' policy, is non-forfeitable. *Cowles v. Continental Life Ins. Co.*, 63 New Hampshire, 300; *Bruce v. Continental Life Ins. Co.*, 58 Vermont, 253. Other cases hold differently;" citing *Holman v. Continental Life Ins. Co.*, 54 Connecticut, 195.

Conditions printed on the same sheet with the policy form part of it although not referred to therein. *Murdock v. Chenango Co. M. Ins. Co.*, 2 New York, 210. But not so of by-laws thus printed. *Houghton v. Manuf. M. F. Ins. Co.*, 8 Metcalf (Mass.), 114; 41 Am. Dec. 489; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wendell (N. Y.), 481; *Commonwealth's Ins. Co. v. Monninger*, 18 Indiana, 352; *Sheldon v. Hartford F. Ins. Co.*, 22 Connecticut, 235; 58 Am. Dec. 420; *Aetna Ins. Co. v. Grube*, 6 Minnesota, 82.

But an accompanying memorandum, not inserted in nor annexed to the policy, does not form a part of it. *Higginson v. Dall*, 13 Massachusetts, 96. So of one detached and folded up with the policy. *Kentucky & L. M. Ins. Co. v. Southard*, 8 B. Monroe (Kentucky), 634. So of a memorandum wafered to the policy in a blank space. *Goddard v. East Texas F. Ins. Co.*, 67 Texas, 69 (citing *Bize v. Fletcher*, and *Bean v. Stupart*, 1 Doug. 11).

In *Jefferson Ins. Co. v. Coheal*, 7 Wendell (N. Y.), 72; 22 Am. Dec. 567,

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it was held that reference in the policy to the application, with the statement that the policy was made and accepted with reference thereto, made the application a part of the contract; but the Court said (expressly *obiter*): “But no case has been given to the Court in which any other document has been held to have been so incorporated into the policy, by reference, as to give to its contents the effect of a warranty, or a condition precedent, on the part of the assured. And I am not disposed to lead the way in the extension of this harsh and vigorous doctrine.” So reference to “the conditions annexed” was held to incorporate them. *Kensington Nat. Bk. v. Yerkes*, 86 Penn. State, 227; *Richards v. Prot. Ins. Co.*, 30 Maine, 273; *Lee v. Howard F. Ins. Co.*, 3 Gray (Mass.), 583.

**No. 65.—BLACKETT v. ROYAL EXCHANGE ASSURANCE COMPANY.**

(EX. 1832.)

## RULE.

IN a voyage policy on ship, under the memorandum “free from average under £3 per cent, unless general,” partial losses incurred at different times during the voyage, each of less amount than £3 per cent, but together amounting to more, may be added together so as to take the loss out of the exception.

**Blackett v. Royal Exchange Assurance Company.**

2 Cr. &amp; Jer. 244—252 (s. c. 2 Tyr. 266).

*Insurance.* — *Voyage Policies.* — *Memorandum.* — *Free from Average under £3 per cent.* — *Aggregate of Losses.*

In an action on a policy of insurance in the usual form, on ship, boat, [244] &c., evidence of usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, is inadmissible.

On the memorandum, “free from average under £3 per cent,” the underwriter is liable for the amount of the aggregate of several partial losses, each less than £3 per cent, but amounting together to more.

Covenant on a policy of assurance at and from London to Calcutta, on the ship *Thames*, her tackle, apparel, ordnance, munition, boat, and other furniture, in the usual form; with the memorandum, “free from average under £3 per cent, unless general.”

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At the trial before VAUGHAN, B., at the London sittings, the plaintiffs having proved the loss of a boat, which with other damage, subsequently incurred by stress of weather, amounted to more than £3 per cent, the defendants offered evidence of a usage that boats, slung upon the outside of the ship, on the quarter, were not protected by the policy. It had been proved, on the part of the plaintiffs, that such slinging was proper and necessary in voyages of the description insured against. The learned Baron was of opinion that such evidence of usage was inadmissible, and he accordingly rejected it.

The defendants then contended that several partial losses, each in itself less than £3 per cent, but amounting in the aggregate to more than £3 per cent, could not be lumped together, so as to take the case out of the exception contained in the memorandum. The learned Baron reserved the point; and the plaintiff had a verdict, with leave for the defendants to move on the rejection of evidence of usage, and on the construction of the memorandum.

In Michaelmas Term, the Attorney-General obtained a rule accordingly, citing *Telly v. Royal Exchange Assurance Company*, Burr. 341 (p. 30, *ante*), on the first point; and Stevens on Average, p. 205, on the last.

[\* 245] \*Spanke, Serjt., and Maule showed cause.—The evidence of usage was properly rejected. The words "boat &c." are express unequivocal words, and evidence of usage was clearly inadmissible to contradict their import. *Parkinson v. Collier*, Park Insur. 416, 1 Phill. Evid., p. 539, 6th ed. If parol evidence had been received in this case, it would have been received to vary an express unambiguous written contract. It was proved at the trial that the boat was properly slung, and that it would have been improper if it had not been so slung. Indeed, even if it had been improperly stowed, negligence in that respect, on the part of the master, would have furnished no defence. It would be extremely dangerous to admit, on such a question, evidence of a usage at Lloyd's, which only amounts to a usage not to pay, a species of prescription *de non silvendo*.

Secondly. The insurance comprehends the whole voyage. The question is, whether, where the ship arrives at her destination, damaged to an extent more than £3 per cent, the underwriters can inquire whether such damage occurred at one stroke? Upon consideration of this proposition, the question answers itself. In

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the case of sea damage to a ship or goods, especially enumerated goods, there can hardly be an instance of an average loss, in which there would not be some ground for inquiring at what period the loss occurred. But there are two cases which will be relied upon. In *Le Cheminant v. Pearson*, 4 Taunt. 367 (13 R. R. 636), it was holden that the liability of the underwriter was not restricted to the single amount of his subscription, but that he may be subject either to several average losses, or to an average loss and total loss, or to money expended about the defence, &c., of the ship, to a much greater amount than the subscription. It is said, that case shows that the losses are several and independent; but it will be found \* not to touch the present question. [\* 246] In the first place, that vessel had been required before the total loss, so as to vest the partial loss; but the nature of the policy is, a contract to indemnify for an aliquot proportion of the ship; and therefore it was clear that the underwriter was liable above the actual sum subscribed. In *Livie v. Junson*, 12 East, 643 (11 R. R. 513), the ship was warranted free from American condemnation; she was afterwards partially damaged, and subsequently seized by the American government and condemned; it was holden that the seizure took away the right to recover for the partial loss. This case shows, conclusively, the ground upon which the previous case proceeded, viz. the intermediate repair; for the assured cannot bring an action against underwriters for a partial loss, pending the voyage, unless the ship be repaired, for she may be lost by a peril not insured against, and then no injury is sustained; and this is the view taken by the author upon whose doubt this rule has in some measure been obtained (Stevens Aver. 205). The foreign writers upon this subject seem to be in favour of the plaintiff; for Emerigon (*Traité des Assurances*, c. 12, s. 44), Valin, and Pothier treat averages and average as identical. On the construction contended for by the other side, the assured might sustain a series of partial losses, amounting to £100 per cent, without having any remedy; and, on long voyages, as frequently happens, there might be a variety of losses under £3 per cent, amounting, together, to a very serious proportion of the whole. If a ship arrive, at the end of her voyage, damaged to an amount more than £3 per cent, the underwriters ought not to be permitted to inquire whether such loss occurred at one period or not. Great inconvenience would arise, if an inquiry of this

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nature were to be entered into after every long voyage. This point has never been raised by the underwriters until [\* 247] \* the present time, though it must frequently have occurred.

The Attorney-General, Campbell, and Follett, *contra*.— Usage may be resorted to, for the purpose of getting at the meaning of words of this description. The evidence was offered to show that the general usage of trade, and particularly at Lloyd's, was, that the underwriters did not pay on the loss of boats slung over the quarters. Such a universal usage showed the understanding of the parties, and what they had in their contemplation. Mercantile contracts are always to be construed according to the meaning in which they are understood by mercantile men. Evidence of usage has been admitted to prove that goods stowed on deck were not within a general policy on goods. *Ross v. Thwaite*, London Sittings after Hil. T., 16 Geo. III.; *Backhouse v. Ripley*, C. P. Sittings after Mich., 1802, *cor. CHAMBRE*, J.; Park on Insur. 26. So, in *Gabay v. Lloyd*, 3 B. & C. 797, 5 D. & R. 641 (27 R. R. 486), evidence of usage was admissible to explain the ambiguous meaning of the word "mortality," a warranty against which had been held, in *Lawrence v. Aberdein*, 5 B. & Ald. 107 (24 R. R. 299), not to extend to a case where animals died in consequence of the agitation of the ship in a storm. It is true that in *Gabay v. Lloyd* the evidence of usage was unsuccessfully offered; but it was admitted for the purpose of showing (if it had been strong enough to do so) that the manner in which the animals perished was not such a loss as the policy contemplated, and that the underwriters did not pay such losses.

In the last of the cases on the subject of goods stowed on deck, the question was not as to the propriety of their being stowed there, but whether, being so stowed, they were protected by the

[\* 248] policy, in which they were not specifically named. Evidence of usage was admitted to show \* that the under-

writers must have been aware of the practice of stowing goods of the description in question on deck; and the proof that they were usually stowed on deck was considered as tantamount to proof that the underwriters were aware of it. *Da Costa v. Edmunds*, 4 Camp. 142 (16 R. R. 763). In *Palmer v. Blackburn*, 1 Bing. 61 (25 R. R. 599), evidence of the usage of settling the loss on a policy on freight was admitted.

But, secondly, several average losses, under £3 per cent, cannot

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be clubbed together, so as to make the underwriters liable. *Le Cheminant v. Pearson*, 4 Taunt. 367 (13 R. R. 636), is in favour of the defendants. It was there held that the losses were distinct, and that the underwriters might be liable for a total loss, after having been liable to contribute for the repairs of a partial loss. It would be very hard to hold that the losses were distinct, so as to charge the underwriters first with a partial, and then with a total loss, if it were also to be held that, for the purpose of charging the underwriters, losses were to be reckoned joint, and that they might be clubbed together for the purpose of making the amount above the £3 per cent. Suppose a vessel sustains a loss above £3 per cent, and that such loss is paid by the underwriters, or is sued for, and that afterwards another loss, under £3 per cent, is sustained, would that second loss give a new cause of action?

[Lord LYNDHURST.—That argument would perhaps be met by saying that no action could properly be brought until the end of the voyage.]

The averages here are quite distinct, as to time, place, and the nature of the loss. The warranty is an answer to each average under £3 per cent, and the underwriters subscribe the policy on the faith of such warranty.

*Cur. adv. vult.*

\* Lord LYNDHURST, C. B., now delivered the judgment of [\* 249] the Court :—

There were two questions in this case, one, whether parol evidence of a usage was admissible to show that, for boats on the outside of the ship, slung upon the quarter, underwriters never paid; the other, upon the construction of the clause, — “ free from average under £3 per cent,” whether the underwriter is answerable for every instance of damage, however small, if the aggregate *in toto* amount to £3 per cent, or whether each instance, where the damage it occasions can be ascertained and is under £3 per cent, is to be excluded; and we are against the defendants upon both. The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called the *Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the whole ship, on all her furniture, and on all her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such

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voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped unless it had a boat in that place, and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be

admissible to explain what is doubtful, it is never admissible to contradict what <sup>\*250]</sup> is plain. The cases which are collected in 1 Phillips, pp. 553–559, and Starkie upon Evidence, pp. 1032–1038, clearly establish this position; and a reference is made to the same subject in the second volume of Mr. Phillips's book, pp. 36, 37. The authority referred to in the argument, as to goods lashed upon the deck, seems to be plainly distinguishable, and to proceed upon a different principle. On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or, if they be goods which ought not to be placed in the ordinary stowage, but in a more perilous situation, he ought to be apprised, either of the nature of the goods, or of the part of the ship in which they are to be put. If he is left to suppose that they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation. This, as it seems to us, is the true principle upon which evidence of usage is admitted as to goods lashed upon deck. They are not in the part of the ship where goods are usually carried, they are in more than usual peril, and a usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature

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of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risk and calculate the premiums, and is a portion of that \* fairness which [\* 251] ought to be rigidly observed upon all these contracts.

The policy is upon goods generally, and the usage explains what description of goods is intended, viz. goods of ordinary, not of extraordinary danger. We are, therefore, of opinion that the evidence of usage was properly rejected.

The next question is, upon the effect of the memorandum “free from average under £3 per cent.” The memorandum is in the nature of an exception. The policy is general, extending to all losses; the memorandum excepts losses where each or all, according to the construction to be put upon it, are under £3 per cent. The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and, if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer (2 B. & C. 207, 5 B. & C. 847, 850, 851). The words here used are ambiguous, capable of excluding every average which *per se* is under £3 per cent, or capable of including every average, however minute, if the aggregate of different averages come up to that amount. Usage might perhaps explain the ambiguity and show which of the two alternatives was intended; but there was no evidence of usage. Emerigon (cap. 12, s. 44, subdivision 4) speaks of averages in the plural, as if it was sufficient if the aggregate of the averages amounted to £3 per cent; but he does not appear to us to speak upon the subject in such a manner as to justify a conclusion either way upon the point in question, and we are not aware of any other writer of authority that does. In the absence, therefore, of usage and authority, it seems to us that we ought to rest upon the rule of construction • we have mentioned, \* and according to that rule the de- [\* 252] fendants are responsible if the aggregate of different averages comes up to £3 per cent. The consequence is, that the rule must be discharged.

*Rule discharged.*

## ENGLISH NOTES.

It has sometimes been a question whether the average or partial loss excepted by a memorandum is to apply to the whole of the goods con-

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sidered as one entire quantity, or whether it may apply to single packages or articles, so that if some are totally lost the insurance may be good for these, although others are saved. The rule has been laid down that where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise to be separately insured, and there is no general average or stranding, the ordinary memorandum ("free from average unless general or the ship be stranded") exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and though such package or packages be entirely destroyed by the specified perils. *Ralli v. Janson* (1856), 6 El. & Bl. 422. But where the memorandum is "free from all average," or the insurance is "against total loss only," there is an obvious reason for construing the exception distributively, if possible; otherwise the saving of a fragment of one article would render the insurance nugatory; and in such a case, if the goods consist of separate and different articles or of packages of articles of various descriptions, the insured may recover in respect of the articles or packages which are totally lost, although others of the articles or packages are saved. *Duff v. Mackenzie* (1857), 3 C. B. (N. S.) 16, 26 L. J. C. P. 313, 3 Jur. (N. S.) 1025; *Wilkinson v. Hyde* (1857), 3 C. B. (N. S.) 30, 27 L. J. C. P. 116, 4 Jur. (N. S.) 482.

## AMERICAN NOTES.

This case is cited in 1 Parsons on Marine Insurance, p. 635, and is sustained by *Donnell v. Columbian Ins. Co.*, 2 Sumner (U. S. Supr. Ct.), 366, which turned somewhat on the question of grammatical construction of the clause, "in each case,"—whether applicable to times of loss or to objects of insurance. STORY, J., said: "But the question as to the ship has recently undergone a solemn adjudication in England. I allude to the case of *Blackett v. The Royal Exchange Ass. Co.* (2 Crompton & Jerv. R. 244), where the Court of Exchequer held, that, under the usual words of memorandum in English policies, 'free from average under three per cent,' successive losses on the ship at different periods of the voyage might be added, to make up the amount. Lord LYNDHURST, in delivering the opinion of the Court, put the case upon a general ground in the exposition of all instruments, and very properly applied to policies, that words of exception in an instrument are to be taken (if doubtful) most strongly against the party for whose benefit they are introduced; and, according to that rule, held the underwriters liable. Now, this is a case, in its reasoning directly applicable to the present. The case (it is true) was that of the ship; but *a fortiori* the same considerations must, upon the grounds already suggested, apply to the cargo. I should have been glad, indeed, to have found the doctrine established upon some broader ground than that of a mere technical rule of construction, satisfactory in itself, but still, in my judgment, sustained by more enlarged

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considerations. It has been intimated that the clause in our policies differs from that in the English policies. In form it does; in substance it is the same, as to all the purposes of this exception."

In the last case, **STORY** disapproves the reasoning and conclusion of the Massachusetts Court in *Brooks v. Oriental Ins. Co.*, 7 Pickering (Mass.), 258, (A. D. 1828), where it is held that "distinct and successive losses are not to be added together, in order to make up the five per cent; but that the damage from disasters happening at one time, or in one continued gale or storm, is to be considered by itself. If this were otherwise, the insurers would be called upon to pay for a great many trifling losses which should be borne by the assured as coming within the common wear or tear of the ship." "But it may be otherwise in regard to the cargo, because the actual damage received at different times cannot be ascertained during the passage, or when it happens, but only when the cargo is unladed."

**No. 66. — BURNETT v. KENSINGTON.**

(K. B. 1797.)

**No. 67. — WELLS v. HOPWOOD.**

(K. B. 1832.)

**RULE.**

**UNDER** the common memorandum, "corn, &c., warranted free from average unless general or the ship be stranded," the fact of stranding, although not in any way the cause of damage, lets in the claim for an average loss.

To constitute a stranding within the meaning of the condition there must be an external force in the nature of an accident causing the vessel to take the ground out of the usual course of navigation.

**Burnett v. Kensington.**

7 Term Reports, 210-226 (4 R. R. 424).

*Insurance.—Free from Average unless general or Ship be stranded.*

If an insurance be effected on fruit, and the policy contain the usual [210] memorandum, "corn, fruit, &c., warranted free from average unless general or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, though no part of the loss arise from the act of stranding.

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No. 66.—**Burnett v. Kensington, 7 T. R. 210, 211.**

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This was an action by the assured against the underwriter on a policy of insurance on fruit on board the ship *Commerce* at and from Malaga and Velez Malaga to Plymouth and Portsmouth; in which was contained the usual memorandum, whereby corn, fish, salt, fruit, flour, and seed were warranted free from average unless general or the ship should be stranded, &c.

[\* 211] \* The plaintiff by his declaration averred that the ship set sail for Malaga on her intended voyage, but by the perils of the sea was stranded, bulged, and destroyed, and the goods on board were wholly lost to the plaintiff, &c.

At the trial before Mr. Justice LAWRENCE and a special jury, at the sittings at Guildhall after last Michaelmas Term, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff on the 15th January, 1795, caused the assurance in question to be made upon a cargo of fruit on board the ship *Commerce*. The defendant subscribed the same for £150. The plaintiff was interested in the cargo beyond the amount of the sum insured, and the assurance was effected in his name and for his benefit. On the 30th November, 1794, the ship sailed with convoy from Malaga with her cargo, consisting of oranges and lemons, to be delivered at Portsmouth and Plymouth, and afterwards parted with her convoy in a gale of wind. On the 29th January, 1795, in the course of her voyage she arrived off Scilly, and between the hours of seven and nine on the morning of that day struck upon a sunken rock about three leagues and a half from the land of Scilly; but she did not remain on the rock, but in consequence of the striking thereon several of her planks were started, and the water immediately after flowed into the hold and over the cargo, and continued to increase in the hold for about three hours and a half. About twelve o'clock on the same day the ship was stranded upon the beach at Scilly. She was so stranded by the captain under the directions of a pilot, who had come on board her from the shore, in order to save the ship and cargo. The ship continued some time upon the beach, during which the water again flowed in and over part of the cargo at the return of the tide. The ship afterwards proceeded on her voyage, and arrived at Plymouth on the 24th February following with the greatest part of her cargo. The cargo of fruit was very much damaged, and a small part thereof left at Scilly, being entirely unfit for use. The ship

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received no damage in consequence of the stranding. The damage she received was entirely from the rock on which she struck: part of the damage the cargo received was occasioned by the water flowing into the ship previous to her being laid on the beach, and part was occasioned by the water that flowed in subsequent to the time of her being laid on the beach. But the cause of the water flowing in arose entirely \* from the ship striking on [\* 212] the rock, and not from any mischief done to the ship by the stranding. The questions were, first, Whether the plaintiff were entitled to recover for all the damage received by the cargo? if he were, then the verdict was to stand; or, secondly, Whether the plaintiff were entitled to receive for such part only of the damage as was occasioned to the cargo by the water that flowed in subsequent to the time of the ship being laid on the beach?—in that case a verdict was to be entered for £—. But if the Court should be of opinion that the plaintiff was not entitled to recover anything, then a verdict was to be entered for the defendant.

The defendant paid the general average into Court.

This cause was first tried at the sittings at Guildhall after Michaelmas Term, 1795: when one of the questions made was, Whether the ship had been stranded within the meaning of the policy? the plaintiff then contending that any grounding and fixing of the ship was a stranding; and the defendant insisting that nothing was to be deemed a stranding, unless such a fixing of the vessel on the ground as that the cargo or the voyage was thereby lost, and not as in the present case where the ship got off and afterwards reached her destined port with her cargo. Upon that occasion the jury found a verdict for the defendant, saying, that they thought it was not a stranding if the vessel got off the ground and prosecuted her voyage; but that stranding meant where she took to the ground and bulged, so as to be incapable of proceeding on her voyage. A motion was made for a new trial in the succeeding term, upon the ground that what was a stranding was a question of law, and that the jury had found their verdict upon a misapprehension of the law as applied to this case. The question was much discussed at the bar: and Lord KENYON said that he should have considered this as a stranding; but he had left it to the jury, not as a matter of law, but as to what was the meaning among merchants of a mercantile word in a mercantile instrument. The Court thought it a case of great doubt and consequence, and

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directed a new trial, desiring to hear what evidence could be adduced of the commercial usage which had obtained in this respect.

Upon the second trial Lord KENYON left it to the jury to find the fact of stranding one way or the other; the parties having agreed, if that point were ascertained in favour of the plaintiff, to

[\* 213] leave the amount of the damage to arbitration. But the jury \* delivered their verdict in writing as follows: "We think this accident attended with all the inconveniences of a stranding; and therefore think that the plaintiff is entitled to a particular as well as to general average." Upon this a new trial was afterwards obtained in Easter Term, 36 Geo. III., on the ground that the jury had omitted to find the very point in issue, namely, whether the ship were or were not stranded.

The cause went to trial a third time, when the jury found that the vessel was stranded, but that the damage did not arise from the stranding, and therefore found for the defendant. Upon which a rule was obtained in Michaelmas Term, 37 Geo. II., calling upon the defendant to show cause why the verdict should not be set aside; against which the defendant's counsel showed cause insisting upon the necessity of the plaintiff's proving that the damage arose from the stranding in order to entitle himself to recover; whereas it appeared to have proceeded from the perishable nature of the commodity insured, or from that and other previous causes combined. But the plaintiff's counsel objected to the verdict on the ground of surprise; having understood that the only question intended to be agitated at the trial was, Whether there had been a stranding or not? and that if a stranding, the amount of the damage was to be left to an arbitrator to determine: he was not prepared at the time with evidence to show that the damage had arisen from the stranding, which otherwise he could have done, and therefore requested to have an opportunity of bringing forward that part of his case. And the Court, assenting to the propriety of that request, made the rule absolute for a new trial; Lord KENYON, Ch. J., at the same time intimating a strong opinion that if the loss happened from any peril insured against, and the ship were at any time stranded in the prosecution of the voyage, the particular average loss ought at any rate to be paid by the underwriter, upon the construction of the words of the memorandum in the policy.

Upon the fourth trial the jury found the facts as stated in the

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case above mentioned. And in the last term Cowper argued for the plaintiff, and Scarlet for the defendant, when the Court directed a second argument; and accordingly on this day it was argued by Park for the plaintiff, and Erskine for the defendant.

Arguments for the plaintiff. The fact of stranding being now found for the plaintiff, the question is resolved into what is the true construction of the memorandum in the policy. This, though a mercantile instrument, must like all other [\* 214] written contracts be construed by a Court of law according to general legal rules, unless there has been a uniform usage giving it a certain meaning, as part of the law merchant; but no such usage exists, as was declared by a special jury of merchants at Guildhall to Lord KENYON in a case hereafter mentioned, of *Bowring v. Elmslie* upon a similar question in 1790, and none such is found by the present case. The general rule as stated by Lord KENYON in the case last-referred to, for construing written instruments containing exceptions, is this: “To let the exception control the instrument as far as the words of it extend, and no further, and then upon the case being taken out of the letter of the exception, the body of the instrument operates in full force.” To apply that to the present case: by the general terms of the policy the underwriter would be liable for average losses on fruit as well as on any other goods; but by the memorandum an exception is made to such a responsibility in the case of fruit, etc., except in two cases, viz., where the average is general, or where the ship is stranded. Therefore if the perils of the sea be so great as to occasion a stranding, the case being taken out of the letter of the exception, it leaves the question to be governed by the general words as if no such exception had been made. The excepting clause was first introduced in 1749, and might have been more properly expressed by saying “free from particular average unless the ship be stranded;” which would consequently have left the underwriter liable in all cases to general average; and if the ship were stranded, then to particular average. Now whether the words be construed to make a condition or an exception is for the present purpose the same thing; in the one case the condition has been performed, in the other the accepted case has happened. Not only the grammatical construction is in favour of the plaintiff, but it is also warranted by the reason of the thing. The clause was framed upon the principle of mutual concession between the assured and the underwriters. By the one it

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was admitted that certain commodities, being of a perishable nature, were more likely to be rendered useless in the course of a voyage by their own deteriorating qualities than by the common perils of the sea; and therefore they agreed not to charge the underwriters for particular average losses, which common experience showed were more generally to be attributed to internal defects than to

external injuries. On the other hand, the underwriters [\* 215] consented \* that if the perils of the sea were so great as to

cause a stranding, they would attribute the injury to this probable and visible cause rather than to the other presumptive one; because from the very nature of the thing it would be attended with great difficulty, litigation, and expense to distinguish how much of the loss was attributable to the one and how much to the other cause. The cases in which this particular point has come in judgment have also adopted the same construction on this branch of the clause in question. *Cantillon v. The London Assurance Company*, cited in *Wilson v. Smith*, Burr. 1553, which was in 1754, is entitled to the more weight because it may be considered as a contemporaneous decision on the meaning of it. There Lord Ch. J. RYDER considered it in the nature of a condition, and that by the ship's being stranded the assured was let in to prove his whole partial loss. It appears clearly from the report of the same case in Magens (2 Mag. 385), that the damage could not have arisen from the mere act of stranding; for it is there stated that the ship in going down the river Thames merely touched the ground; and yet the average loss which the underwriters were condemned to pay was, as he states, considerable. The question does not appear to have occurred again till the case of *Bourring v. Elmslie*, London

sittings after Trinity, 1790, where Lord KENYON, who tried [\* 216] the cause seems to have been of the same opinion with \* Lord Ch. J. RYDER.<sup>1</sup> The case of *Wilson v. Smith*, Burr. 1550,

<sup>1</sup> The following note of that case was read:—"This was an action upon a policy of insurance on fish on board the ship *Nymph* from Chaleur Bay to her port or ports of discharge in England, Ireland, Portugal, Spain, or Italy, warranted to sail on or before the 20th September, 1788. The usual memorandum by which fish, &c., was warranted free from average, unless general, or the ship were stranded was added. The action was brought to recover an average loss sustained by the fish, the

ship having been, as the plaintiff alleged, stranded: that is, she was in such a leaky condition that the captain and crew thought it necessary to run her ashore off Malaga for their own preservation, thinking it would be impossible to get her into port. For the defendant it was contended that there was no necessity for running the ship on shore, but that it had been done with a fraudulent intention. Secondly, that supposing the ship to have been unavoidably stranded, the greater

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is relied on by the defendant as having established a different construction upon the exception in the memorandum; but that case is very distinguishable from the present, for there the question arose upon the other branch of the exception, namely, where the average was general. Neither was there a stranding [217] in the case of *Cocking v. Frazer*, E. 25 Geo. III., *vid. Park on Insurance*, 1st edit. 22 and 129; and what was said by BULLER, J., that the underwriter in these cases had never been held liable but where there had been a total loss of the commodity, was with reference to the facts of the case where the assured went as for a total loss, though the commodity itself, which was fish, existed, but was in a putrefied state; it being the very object of the memorandum to guard against the underwriter's liability under such circumstances. The last case in which the question collaterally arose was that of *Nesbitt v. Lushington*, 4 T. R. 783 (2 R. R. 519). There a mob having seized a vessel laden with corn, and stranded her, took away part of the cargo; and the Court held that the assured could not recover upon a count stating the loss to be by a seizure by people;

part of the damage sustained by the fish was occasioned by its having been too long on board, and not by any defect in or the stranding of the ship.

"Lord KENYON, Ch. J., summed up thus to the jury: The question in the cause is, whether a partial average can be recovered; and this, in the first place, depends upon the opinion you shall be of with respect to the ship's having been stranded. I think that the ship being on shore in the manner she is represented to have been, would be a stranding within the meaning of the memorandum. But the doubt is, whether the running her on shore was done for the best, or in execution of a fraudulent design. The plaintiff's witnesses state it to have been of necessity; but on the other hand it appears that there was not any probable ground for apprehending serious danger. There were not more than five inches water in the hold, and the pumps were all in order; it was in open day, and but little wind; however, it is for you to decide upon the whole of the evidence, whether the captain and the crew acted *bonâ fide*, and ran the ship on shore because they reâlly thought she could not safely be got into Malaga. If you think that they did, then arises a further question upon

the construction of the memorandum at the foot of the policy. This, like the policy itself, must be interpreted by the usage of merchants. [The merchants in Court here signified to his Lordship that there was no usage upon the subject; the question had not before occurred, and was now for his decision.] His Lordship then observed, that the general mode of construing deeds to which there are exceptions, is to let the exception control the instrument as far as the words of it extend and no further; and then upon the case being taken out of the letter of the exception, the deed operates in full force. That agreeably to this rule it seemed to him that the stranding of the ship put fish in the same condition as any other commodity not mentioned in the memorandum; and the underwriters were liable for all damage sustained by it; for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing that the memorandum was intended to prevent. A verdict was given for the defendant upon the ground of the ship having been run on shore fraudulently."

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that word in the policy meaning the ruling power of the country. But there Lord KENYON expressly said: "That on the meaning of the memorandum he had no doubt. It was inserted," he said, "to prevent disputes; and the underwriters thereby expressly provided that they shall not pay an average upon the articles enumerated, unless it be general or the ship be stranded. That when a ship is stranded the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of it, though the fact cannot always be ascertained." It is true that Mr. Justice BULLER said that the assured can only recover in such a case "where the loss arises from the stranding of the vessel." But it does not appear that he meant to use these words in contradiction to the opinion expressed by Lord KENYON; but rather in contradistinction to losses arising from some other independent cause, not connected with stranding. The case of *Jones v. Schmoll*, cited 1 T. R. 130, is also relied on as showing that the assured can only entitle himself to recover by proving that the loss sustained was a direct and immediate, and not a remote, consequence of the peril insured. That might apply if the words here had been that the underwriter would not be liable for the loss "unless by stranding;" but [\* 218] the words are "unless the ship be \* stranded."

Arguments for the defendant. The finding of the jury is conclusive that none of the injury to the cargo is attributable to the stranding; for though some of it happened afterwards, yet that is found to have arisen from the prior accident of the ship's striking upon a rock. The question therefore comes to this, whether if the injury happen from a cause for which the underwriters are not liable for a particular average, and any time afterwards in the course of her voyage the ship happen to be stranded, though no injury result therefrom to the cargo, the underwriters are still liable; or whether they are only liable for damage resulting from the stranding. The exception in the memorandum must be construed with reference to the contract of which it is a qualification.

[219] The construction which prevails in respect to evidence of losses in general is that the assured shall show that the injury sustained results immediately from some particular peril insured against, as was held in *Jones v. Schmoll*, 1 T. R. 130 n.

But this is an attempt to recover upon a loss unconnected [220] with the peril insured against. Whatever doubt might formerly have been entertained, the case of *Wilson v. Smith*.

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Burr. 1550, has now put a judicial construction upon the words “free from average unless general or the ship be stranded;” which latter words the Court held were an exception, and not a condition, and that the assured was not entitled to recover a partial loss on corn, because there had also been a general average loss incurred. It is no answer to say that that was not a case of stranding, because the same construction must necessarily be put on the second as on the first branch of the exception: the term of connection is the same, “unless general,” or “unless the ship be stranded;” and so Lord MANSFIELD expressly considered it in giving judgment, for he said that “the insurer is liable for all losses arising from the ship being stranded.” “All other partial losses,” he said, “are excluded by the express terms of the policy.” And Mr. Justice BULLER gave the same opinion in *Nesbitt v. Lushington*, 4 T. R. 188 (2 R. R. 519). The loss to be recovered, he said, must “be a direct and immediate consequence of the stranding.” It is true that Lord KENYON intimated a different opinion in that case; but it was without reference to the case of *Wilson v. Smith*, the point not being in judgment before the Court. The case of *Centillon v. The London Assurance Company*, Burr. 1553 and 2 Mag. 385, proceeded upon the ground that the damage arose in consequence of the stranding; for as the case is reported

\*by Magens, the jury considered it as a consequence of [\*221] her having been aground and becoming leaky, though it was not immediately perceived. That is more likely to be an accurate account of the case than the one mentioned by Sir F. Norton for the purpose of his own argument: and Magens’s own opinion of the meaning of the memorandum is decisive in favour of the defendant. As to *Bowring v. Elmslie*, the only question was, whether the stranding were or were not fraudulent; and no evidence was offered to show that the cargo was damaged by any other cause than the stranding; therefore this question could never have arisen.

Lord KENYON, Ch. J.—We have had abundant opportunity of considering and reconsidering this case; but I confess that, though my mind has at times been wavering, it at last rests at the point where it first set out. When this question arose and was judicially decided in 1754, I wish, if any doubt had then arisen on the opinion which was then formed by a jury of merchants under the directions of Lord Ch. J. RYDER, that instead of silently acquiescing in that decision, the defendant had resisted it by a motion for

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a new trial, or that all the underwriters had corrected the ambiguous terms of this memorandum. But that opinion was acquiesced in by the parties to that cause; and it appears that the great insurance companies in London have since left out the words in the memorandum, "unless the ship be stranded."

The words of this policy are in general terms, including all cases: then comes this memorandum, "corn, fish, salt, fruit, flour, and seed, warranted free from average unless general or the ship be stranded." This, therefore, lets in a general average; and I do not know how to construe the words grammatically but by saying that if the ship be stranded, then it destroys the exception and lets in the general words of the policy. If a general provision be made in any deed or instrument, and it is there said that certain things shall be excepted unless another thing happen which gives effect to the general operation of the deed, if that other thing does happen it destroys the exception altogether. My two opinions that have been referred to, the one in the *Nisi Prius* case, and the other in *Nesbitt v. Lushington*, have no weight with me as judicial authorities, though I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion in those cases.

Without inquiring into the reasons for introducing this [\*222] exception, on the grammatical construction of the \* whole

I have no doubt. But let us also consider some of the cases decided on this subject. That of *Cantillon v. The London Assurance Company* I take from a better authority than that of Magens: I take it from Burr. Rep. as it was cited by Sir F. Norton, who, being in possession of a great portion of *Nisi Prius* business at that time, was probably counsel in the cause, and who cited it in the presence of many persons who could have corrected him if he misrepresented it. Sir F. Norton stated that the ship being stranded (and not merely touching the ground, as supposed by Magens), the insured recovered an average loss; for, he said, Lord Ch. J. RYDER and a special jury considered it as a condition, "and that by the ship's being stranded the insurer was let in to claim his whole partial average loss." Now that is a judicial decision on the very point by a special jury of merchants under the directions of a learned Judge, acquiesced in at the time by every person, and the great assurance companies in London altering the form of their policies in consequence of it. Probably the private underwriters were aware of it; but they chose to continue their policies

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in the whole form in order to run away with the insurance business from the great companies; for if they did not intend to be answerable for such a loss, they would have altered the terms of this memorandum. Generally speaking, if I were bound to decide between the opinions of Lord MANSFIELD and Lord Ch. J. RYDER, perhaps I should be guided by the former in preference to the latter; but what fell from him in the case of *Wilson v. Smith* was only an *obiter dictum*, and I confess it does not bring conviction to my mind. With regard to *Cocking v. Fraser*, it is sufficient to say that there was no stranding in that case: what was there said likewise was only an *obiter dictum*, and I cannot subscribe to the opinion there given. It was there said, “if the commodity specifically remains, the underwriter is discharged; but if fish be deteriorated by the accident of stranding, I take it that the underwriters would be answerable though the article specifically remained. If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said, “unless for losses arising by stranding.” But in the body of the policy they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is “free from average unless \*general, [\*223] or unless the ship be stranded;” so that if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and the grammatical construction of the policy; and thinking so, I am bound to give the same opinion I formerly gave, not because I gave that opinion before, but because I am convinced by the reasoning that led to it.

ASHHURST, J.—This memorandum is certainly couched in doubtful words; and that being the case, the best construction that can be put on them is that which will prevent litigation. As it is difficult to determine, when the ship has been stranded, whether or not the damage to the cargo arose from the stranding, or how much of the damage was owing to that cause, it seems as if this memorandum were introduced to avoid that inquiry, and that when the ship has been stranded the underwriters consent to ascribe the loss to that cause. This construction will prevent endless litigation, and it has already been put on the memorandum in the cases of *Cantillon v. The London Assurance Company* and

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*Nesbitt v. Lushington*; and so well satisfied were the great assurance companies with the former of those determinations that they struck these words "or the ship be stranded" out of their policies in consequence of it. Then those authorities having decided the point, there is now not only no reason to overset them, but a very strong reason to induce us to support them, namely, that this construction of the policy will tend to prevent litigation.

GROSE, J.—This is an action for a loss by the perils of the seas, for which the defendant says that he is not answerable because it is an average loss on fruit, and that fruit is within the memorandum; but the plaintiff replies that this case is within the exception, because the ship was stranded. And that brings it to the true construction of the memorandum and of the exception to it, whether the underwriters be or be not liable for an average loss when there is a stranding, though no part of the loss arise from the stranding of the ship. I have had great difficulties in bringing my mind to decide this, because the consequence of considering this as an exception to the memorandum, as the words import, is this, that if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather and the cargo sustains an average loss of ninety per cent, the under-

writers are answerable for the whole of that average loss  
[\* 224] \* when it is admitted that no part of it happened in

consequence of the stranding. Then it becomes necessary to consider the words of the policy, the intention of the parties in introducing those words, and the decided cases. On the words no doubt can be raised; they are clear. The insurers engage that certain articles, of which fruit is one, shall be free from average except in two cases,—one if it be a general average, the other if the ship be stranded; but if either of these happen, then those articles are not to be free from average. Here the ship was stranded, and then according to the words this case comes within one of the exceptions. Next let us consider the reason for introducing the exception: all the articles there enumerated are of a perishable nature; and as it is difficult to ascertain whether any damage happening to them arose from the stranding or from the perishable nature of the articles, the parties seem to have agreed that there shall be no partial average unless the ship be stranded: that is, as was said by Lord KENYON in *Nesbitt v. Lushington*, in order to avoid a difficult inquiry they agreed to consider the loss

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to have happened in consequence of the stranding. If we were to determine that the assured could only recover for the loss that happened by the stranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore it seems to me best to decide this case on the plain import of the words, notwithstanding the absurdity which I at first pointed out will follow. Besides, if the parties had intended that the insurers should not be liable to the average loss unless part of the loss happened by the stranding, they would have added words to this effect: "unless part of the loss happen by the stranding;" and the omission of such words strongly induces me to determine strictly according to the words that are inserted in the memorandum. However, this case is not without a precedent. On examining the cases that have been cited on both sides, it appears that there is only one decided on the point, *Cantillon v. The London Assurance Company*, for with regard to that of *Wilson v. Smith* it is observable that the ship was not stranded there. But the case of *Cantillon v. The London Assurance Company* is the more to be relied on, because the great assurance companies have acted upon it ever since. Therefore though I should have had great doubts if the question had never been determined, I think it is better to decide according to the words of the policy, especially as that construction \* is [\* 225] supported by the above case, though it is open to the inconvenience to which I at first alluded.

LAWRENCE, J.—Although the jury found that part of the damage happened after the stranding, it is also found as a fact that the ship received no damage in consequence of the stranding; and if the ship had not been stranded, both the ship and cargo would have been totally lost. The question therefore is, Whether an average loss is payable to any amount, however great, from whatever cause the loss may arise, if the ship happen to be stranded? Now considering how extremely inaccurate a policy of insurance is penned, I think that too great stress ought not to be laid on the precise words used in it. If the exception in the memorandum be confined to losses arising from the stranding, it must be from this consideration, that otherwise it would be a temptation to the master to strand the ship, if any trifling damage were done to the cargo, to enable the assured to recover. On the other hand, if nothing can be recovered from the insurers but

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No. 67. — **Wells v. Hopwood, 3 Barn. & Ad. 20.**

for damage arising from the stranding, it would be the interest of the master to desert the ship whenever a stranding happened, and then there would be a total loss. However, in a case where the words of the policy are inaccurate, and where there are inconveniences attending each construction, if the case has ever been decided I think that we ought to be guided by it. In the case of *Wilson v. Smith*, which was principally relied on for the defendant, Lord MANSFIELD seemed to consider that the word "unless" did not create a condition; but that the meaning of the exception was that the underwriters should only be liable for an average loss in two cases, — one where there is a general average, the other where the damage arises from the stranding. But in so considering it Lord MANSFIELD went beyond the facts of the case then before the Court, for there the question was, whether the assured was entitled to recover a partial average from the circumstance of his being entitled to recover a general average; now the words of the exception are not warranted free from average "unless there be a general average, or unless the ship be stranded," but warranted free from average "unless general or the ship be stranded;" therefore as there is a difference in the expression of these two exceptions, perhaps it may be considered as a condition as applied to the stranding, though it be not a condition as applied to the general average. If so, then there is only one authority in point, that of *Cantillon v. The London Assurance Company*,<sup>[\* 226]</sup> in which case, according to the report \* of it in Burrow, it was considered that the stranding was a condition, and that the underwriters were liable on the happening of that condition. Therefore as the very question has been once decided, I think it ought to govern our decision in this case; especially as the question arises on the construction of an instrument so inaccurately penned as a policy of assurance.

*Postea to the plaintiff.*

### **Wells v. Hopwood.**

3 Barn. & Ad. 20-36.

*Insurance. — Warranty. — Free from Average unless general or the Ship be stranded.*

[20] A ship having on board goods which were insured on a voyage from London to Hull, but "warranted free from average unless general or the ship be stranded," arrived in Hull harbour, which is a tide-harbour, and proceeded to

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discharge her cargo at a quay on the side of it. This could be done at high water only, and could not be completed in one tide. At the first low tide the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel.

*Held*, by Lord TENTERDEN, Ch. J., LITTLEDALE and TAUNTON, JJ., PARKE, J., *dissentiente*, that this was a stranding within the meaning of that word in the policy.

Insurance upon the ship *Britannia* and the cargo at and from London to Hull, and until the goods should be discharged and safely landed. The declaration set out the policy, which was in the usual form, and contained a memorandum whereby corn, fish, fruit, flour, and seed were warranted free from average unless general or the ship should be stranded. Plea, the general issue. At the trial, before PARKE, J., at the Spring Assizes for Yorkshire, 1830, the plaintiff was \* nonsuited, subject to [\* 21] the opinion of this Court upon the following case:—

The plaintiff, who is a merchant at Hull, in the month of June, 1829, shipped in London, on board the *Britannia*, for Hull, sixty-nine butts of Zante currants. Upon this cargo the policy of insurance was effected by the plaintiff's agent on behalf of the plaintiff, and the defendant subscribed the same for £300 at the premium of 5s. 3d. per cent. The butts of currants were properly stowed in the vessel, which was in every respect sound and seaworthy. The ship sailed from London in June, and arrived at Hull on the 26th of the same month; and in the afternoon of that day was, at high water, moored alongside the plaintiff's quay, which projects about fifteen feet into the Hull harbour, in front of the plaintiff's warehouse. The harbour is a tide-harbour. In the harbour, and to the south of the quay adjoining the plaintiff's warehouse, there is a bank of stones, rubbish, and mud, which had been there ten or fifteen years, and had in the course of time extended itself beyond the outer line of the plaintiff's quay, near the end of which it projects, sloping off so far into the river Hull, at that part of the harbour, as to make it necessary and usual for large vessels, when lying opposite the plaintiff's quay, to be hauled off ahead from the quay shortly after high water, to avoid grounding on the bank. When the *Britannia* arrived at the plaintiff's

## No. 67.—Wells v. Hopwood, 3 Barn. &amp; Ad. 21-23.

quay, she was moored as usual ; and as her bow projected beyond the south end of the plaintiff's quay, and was, at high water, immediately over the bank, her head was, according to the usual practice on such occasions, and in order to avoid grounding on the bank at low water, hauled off, at the time of the tide [\* 22] \* falling, from the quay, by a rope being carried out from her head to the opposite side of the harbour, and there fastened to a post, and hove tight, the stem of the vessel remaining moored by a rope fastened to the plaintiff's quay. After this she grounded in safety upon the soft mud in the harbour, and, soon after six o'clock the next morning, the delivery of her cargo was commenced. When she again floated, at high water, the rope which extended from her to the opposite side of the harbour was loosened, and her head was again hauled alongside the quay, and the delivery of her cargo continued. When the water subsided, the rope was again fastened, as before, to the opposite side of the harbour, and her head was, in like manner, hauled off, for the purpose of avoiding the bank, and the rope was then hove tight. On the evening of the 27th, after the vessel had been placed in this position, and had safely taken the ground, with her head from the bank, the captain sounded the pumps, and found all right. On the morning of the 28th, the tide having fallen, the ship had changed her position, and was found nearer the quay, with her forefoot on the said bank. This arose from the rope which was fastened to the opposite side of the harbour having stretched, and the wind at the same time blowing from the east towards the bank, and causing a strain on the rope. It was not broken, or injured, or loosened at either end. There was no shock or concussion felt by those on board. In consequence of the grounding with her forefoot on the bank, the vessel strained at the time, and her seams opened, and a quantity of water thereby found a passage into the hold, and damaged several of the butts of currants. [\* 23] Upon her floating again, the seams again closed, and \* upon her being subsequently examined no injury was discovered. The amount of damage was proved to be £25 5s. 4½d. upon the sum of £300 insured. The question for the opinion of the Court was, whether this was a stranding within the meaning of the memorandum in the policy. If the Court should be of opinion that it was, a verdict was to be entered for the plaintiff, otherwise the nonsuit to stand.

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The case was argued in the course of last Trinity Term by F. Pollock for the plaintiff, and Holt for the defendant. The arguments, and the several authorities cited, are so fully considered and commented on by the learned Judges in delivering their opinions, that it is deemed unnecessary to notice them further.

*Cur. adv. vult.*

There being a difference of opinion, the Judges, in the course of this term, delivered their judgments *seriatim*.

TAUNTON, J.—The question here is, whether there has been a stranding within the meaning of the memorandum in the policy. Upon the question, what constitutes a stranding, there have been many decisions within the last forty years, and the difference of circumstances is so minute in many cases wherein a different conclusion has been drawn, that it is not easy to reconcile them all. This distinction, however, appears to me to be deducible, that in instances where the event happens in the ordinary course of navigation, as, for instance, from the regular flux and reflux of the tide, without any external force or violence, it is not a stranding; but where it arises from an accident, and out of \* the common course of navigation, it is. The difficulty consists in the application of the rule. In *Dobson v. Bolton*, at Guildhall, after Easter Term, 1799, 1 Marsh. on Ins. 231, 3d edit., the ship ran on some wooden piles four feet under water, about nine yards from the shore; and Lord KENYON held it to be a stranding. In what way the ship ran on the piles does not appear; but the word "ran" denotes some external force, and therefore some extraordinary cause is implied. So also, where the accident was caused by the wind, which had been moderate, suddenly taking the ship ahead, and driving her ashore stern foremost: *Harman v. Vaux*, 3 Camp. 429 (14 R. R. 773), and in *Baker v. Toury*, 1 Stark. 436 (18 R. R. 803), by the ship being driven by the current on a rock; in each instance the occurrence was ruled to be a stranding. So also in *Rayner v. Godmond*, 5 B. & Ald. 225 (24 R. R. 335), the like conclusion was come to, where the ship, in the course of her voyage upon an inland navigation, arrived at a place called Beal Lock, and while she was there it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four others. The water being then drawn

[\* 24]

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off, all the vessels grounded, and the ship insured grounded on some piles in the river which were not known to be there, and the cargo received considerable damage. The part of the navigation where she took the ground was one in which vessels usually were placed when the water was drawn off. In that case Lord TENTERDEN, distinguishing it from *Hearne v. Edmunds*, 1 Brod. & Bing. 388

(21 R. R. 660), observed: “There the accident happened in [\* 25] the ordinary course of the voyage, and on that ground \* the

underwriters were held not to be liable. Here the loss did not so happen, for we cannot suppose that these canals are so constantly wanting repair as to make the drawing off of the water an occurrence in the ordinary course of a voyage. I think, therefore, that in this case the vessel was stranded.” In *Carruthers v. Sydebotham*, 4 M. & S. 77 (16 R. R. 392), the ship insured having arrived opposite the dock at Liverpool, the pilot, in the absence of the captain, and contrary to his caution against letting the vessel take the ground, laid her aground in the Mersey, on a bank. When she floated, he took her to the pier of the basin, and made her fast there, with the intention that she should take the ground when the tide fell. Soon afterwards the vessel took the ground astern, and the water leaving her, she fell over, on the side farthest from the pier, with such violence that she bilged, and broke many of her timbers. When the tide rose again, she righted, but with ten feet water in her hold, by which the cargo was wetted and damaged. The Court held that this was clearly a stranding, the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened. The same doctrine was holden in *Barrow v. Bell*, 4 B. & C. 736 (28 R. R. 468). There, the ship having been compelled by tempestuous weather to bear away for Holyhead, and having struck on an anchor upon entering the harbour, whereby she sprang a leak, and was in danger of sinking, she was in consequence warped further up the harbour, where she took the ground. In *Bishop v. Pentland*, 7 B. & C. 219 (31 R. R. 177), which is the most recent

decision on the subject, a ship was compelled, in the course [\* 26] \* of her voyage, to go into a tide-harbour, where she was moored alongside a quay, where ships of her burthen usually were moored, and in as safe a situation as could be found. It was necessary, in addition to the usual moorings, to lash her by a tackle fastened to her mast to posts upon the pier, to prevent

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her falling over upon the tide leaving her. The rope being of insufficient strength, the tackle by which the ship was lashed, when the tide was out, broke, and the ship fell upon her side, by which she was stove in and greatly injured; and this was held to be a stranding. This last case, I think, cannot be distinguished from the present, the only difference as to the immediate cause of the damage being, that there the rope broke, and here it stretched; but with respect to the circumstances which constitute a stranding, this case is much the stronger of the two; for here it is found, that the wind blowing from the east towards the bank, and causing a strain on the rope, the ship in consequence had changed her position, and was found nearer the quay, with her forefoot on the bank, so that here there was a change of the position of the ship, and a stranding by her forefoot being on the bank, and this partly, if not wholly, effected by the easterly wind. This, I think, was an accidental circumstance, not necessarily incident to the course of navigation. On the authority of these cases, therefore, I am of opinion that there was a stranding in this instance within the meaning of the memorandum.

With respect to the cases cited on the other side, namely, *Buring v. Henkle*, before Lord KENYON, at Guildhall, after Trinity Term, 1801, Marsh. on Ins. 232; *M'Dougle v. The Royal \* Exchange Assurance Company*, 4 M. & S. 503 (16 [\*27] R. R. 532); and *Hearne v. Edmunds*, 1 Brod. & Bing. 388 (21 R. R. 660), it is sufficient that the law of the first is extremely doubtful; for there the ship was driven aground, and continued in that situation an hour; and although this happened in consequence of one brig running foul of her bow and another of her stern, yet it should seem that a ship taking the ground and remaining there a considerable time, must be considered as a stranding, whether it proceeds from the violence of the wind, or from any other accident out of the usual course of navigation. In *M'Dougle v. Royal Exchange Assurance Company* it was only holden that remaining upon a rock only a minute and a half after striking on it was not a settlement of the ship for a sufficient length of time to constitute a stranding. And with respect to the last, *Hearne v. Edmunds*, the decision was founded upon this, that the vessel was proceeding in the ordinary way, and took ground on the ebb of the tide, without any extraneous accident.

PARKE, J.—This was an action on a policy of insurance on fruit

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from London to Hull, with the usual memorandum. The vessel arrived in Hull harbour, which is a tide-harbour, and proceeded to discharge her cargo at a quay on the side of it. This could be done at high water only, and could not be completed in one tide. At low water the vessel grounded on the mud; but on one occasion the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, [\*28] which it was intended that \* she should have done, but her forefoot got on a bank of stones, rubbish, and mud, near to the quay, and the vessel having strained, some damage was sustained by the cargo. Upon her floating again the seams closed, and on examination, no injury to the vessel was discovered. The substance of the case is shortly this: that a vessel, which, according to the ordinary and usual course in that part of the voyage, was laid on the ground by the master and crew at low water, from an accidental cause did not ground in the place that they intended, but sustained no damage; and the question is, whether this was a "stranding" within the meaning of the memorandum: and I am of opinion that it was not.

In reading this memorandum, two things are clear: first, that according to its grammatical construction, the simple fact of "stranding" destroys the exception in favour of the enumerated articles contained in the memorandum, and includes them in the general operation of the policy, though no damage is thereby done to those articles; and the memorandum is not to be read as if it had contained a further condition besides the stranding of the ship—that such average should be occasioned by the stranding. This construction is now fully established by the decisions, *Nesbitt v. Lushington*, 4 T. R. 783 (2 R. R. 519); *Burnett v. Kensington*, 7 T. R. 210 (p. 187, *ante*); and it follows that in all cases the inquiry is to be, what condition of the ship constitutes a stranding, and not whether the cargo be thereby injured or not.

Secondly, another thing may be as clearly collected from the terms of the memorandum; namely, that the under- [\*29] writers, who are presumed to know the usual \* course of the voyage insured, do not intend, under the term "stranding," to include an event which must be of occasional, and in all probability of frequent, occurrence in the course of the voyage insured. If the term is to be applied to such an event, the

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exception from average is nugatory, and might as well be omitted altogether. If, for instance, the grounding of a vessel, on a voyage in which she would have to navigate a tide river or harbour, and must necessarily take the ground, be a stranding within the meaning of this memorandum, and puts an end to the exemption from average loss, the clause containing that exemption could never take effect on such a voyage, and would have no operation. The underwriters must be presumed to have intended that the exemption might take effect, and, therefore, must have meant by this term an event which would not happen in the ordinary and usual course of the voyage — a grounding different from that which ordinarily and usually occurs to vessels navigating tide rivers and harbours. Upon this principle the case of *Hearne v. Edmunds*, 1 B. & B. 388 (21 R. R. 660), was decided, and it was there held that the taking of the ground by a vessel in the ordinary and usual course of the voyage is not a stranding within the intent of the usual memorandum.

Now, to apply this rule to the present case, it was the ordinary and usual course of the voyage insured for the vessel to be laid on the ground in this harbour: she was laid on the ground according to that usage, though not precisely in the place intended; and the whole question in the cause is, whether that circumstance makes a difference. That circumstance cannot, as it seems to me, \* constitute a stranding, unless it can be [\* 30] said, that whenever, from the influence of wind or tide, or from any accidental causes, the vessel takes the ground at a small distance from the place intended, though she sustains no damage thereby, she would be stranded. If the master and crew meant to place their vessel on one sand-bank, and, by accident, placed it on another, twenty feet off, and no damage was sustained in consequence, no one would say that the difference in situation constituted a stranding; and if the injury to the cargo is suggested as making all the difference, the answer is, that that circumstance must be omitted, for the reasons before given, from the consideration of the case. It follows that it can make no difference if the ship be laid on the ground voluntarily, in the course of a voyage where such a proceeding is usual, whether she be laid on a hard bank or a soft one, or partly on one and partly on the other: in neither case would there be any stranding. This will be more readily conceded if we look at the case, as we ought to do, stripped of the consideration of damage to the cargo. Suppose the precise

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circumstance in question to have occurred to this vessel, that the cargo was uninjured by this event, but had been injured in the course of the previous voyage, would the assured be entitled to recover an average loss? Or suppose that the rope, instead of stretching from its dryness, had contracted from its wetness, and the wind had blown from the west instead of the east, and the vessel (as it would have done) had taken the ground at low water farther from the quay, but equally far from the place intended by the crew, would it have been contended that she was thereby

stranded, and the assured let in to claim for all the damage sustained by the cargo insured on a previous \* part of the voyage? It appears to me that it would be a consequence resulting from the decision that the circumstances stated in this case constituted a stranding — that the vessel would be also considered as having been stranded in the supposed cases. Far as the decisions have carried the meaning of this term beyond its ordinary and usual signification, the effect of the present decision would be to carry it much further.

It seems to me better to hold that no vessel can be considered as stranded when she is laid on the ground by the voluntary act of the master and crew, in the course of a voyage in which the usage is to lay vessels on the ground, and it is done in pursuance of that usage, and the vessel is uninjured thereby. The present case is, however, in some respects, different from all that have been decided, and on which reliance was placed by the counsel for the plaintiff on the argument.

The case of *Carruthers v. Sydebotham*, 4 M. & S. 77 (16 R. R. 392), is distinguishable, and was distinguished in that of *Hearne v. Edmunds*, 1 Brod. & B'ng. 388 (21 R. R. 660), and also in that of *Rayner v. Godmond*, 5 B. & Ald. 225 (24 R. R. 335); for the vessel was laid on the ground against the wish of the master, and out of the usual course of the voyage. In *Rayner v. Godmond* the vessel was considered as having been placed on the ground out of the ordinary course of that voyage; and in *Bishop v. Pentland*, 7 B. & C. 219 (31 R. R. 177), the vessel was held not to have been stranded, when placed on the ground by the crew in a tide-harbour; but when she was thrown over by an unusual accident, the Court thought that a stranding took place. In that case

also the vessel was stove in and greatly injured by falling over; \* and I should feel a difficulty in saying that the

No. 67.—*Wells v. Hopwood*, 3 Barn. & Ad. 32, 33.

decision of that case would have been right if that circumstance had not occurred; I can hardly think the vessel would have been considered as stranded if she had fallen over in a tide-harbour, where she took the ground in the ordinary course, and had sustained no damage at all.

For these reasons, I think that the judgment of the Court ought to be for the defendant.

LITTLEDALE, J.—I was one of the Judges who held, in the case of *Bishop v. Pentland*, 7 B. & C. 219 (31 R. R. 177), that what occurred there amounted to a stranding. Upon further consideration, I continue of the opinion that I then entertained; and that being so, I think it unnecessary to give any additional reasons in favour of that opinion. And then, the only question with me is, whether the circumstances of this case are so far similar to what occurred in that as to warrant the same judgment.

In the present case, the vessel arrived in Hull harbour (which is a tide-harbour) on the 29th of June, and was, at high water, moored alongside the quay. In order to avoid grounding on a bank at low water, she was, at the time of the tide falling, hauled off from the quay by a rope carried out from her head to the opposite side of the harbour, and there fastened to a post and hove eight, the stern of the vessel remaining moored by a rope fastened to the quay. This was her situation on the evening of the 27th June, 1829; she was therefore then safely moored in a place where, in the ordinary course of her proceeding, she was intended to be. On the morning of the 28th, the tide having fallen, the ship

\* had changed her position, and was found nearer the quay, [\* 33] with her forefoot on the bank. This arose from the rope (which was fastened to the opposite side of the harbour) having stretched, and the wind, at the same time blowing towards the bank, causing a strain on the rope. She then grounded in a place where, in the ordinary course of proceeding, she was not meant to be, and she came to the ground by a peril of the sea, and by such grounding received some temporary damage. In *Bishop v. Pentland* the vessel was moored alongside the quay, where ships of her burthen and build coming into Peel harbour usually were moored. She was therefore in a place where, in the ordinary course of her proceeding, she was meant to be. It was necessary, however, to lash her, by tackle fastened to the mast, to posts upon the pier, to prevent her falling over on the tide leaving her. The state of the

## No. 67. — Wells v. Hopwood, 3 Barn. &amp; Ad. 33-35.

harbour where the vessel lay would have had no effect upon her if she had been properly lashed, and she would have sustained no damage in the harbour if the rope had not given way ; which rope had been used contrary to the opinion of a person who had acted as pilot. When the tide was out, the tackle by which she was lashed broke, and she fell over upon her side, by which she was stove in and greatly injured. But for the breaking of the tackle the ship would have remained in the same situation that ships usually are in Peel harbour during ebb. In that case also the vessel came to the ground in a place where, in the ordinary course of proceeding, she was not meant to be, and came there by a peril

of the sea, and by the grounding received damage. In [\*34] both cases \* the damage arose from a rope, in the one instance breaking, in the other, stretching. In that case, it is true, the vessel fell over on her side, whereas in this she grounded without falling over ; in that case, too, she was materially injured, whereas here she was only injured for a few hours, and not permanently ; but these differences do not appear to me to be of such importance as to warrant a different judgment. On the whole, therefore, I think that the case ought to be governed by the decision in *Bishop v. Pentland*, and, consequently, that there was a stranding, which entitles the plaintiffs to recover.

Lord TENTERDEN, Ch. J. — Several of the cases hitherto decided on this subject are, as to their facts, very near to each other, and not easily distinguishable. But it appears to me that a general principle and rule of law may, although perhaps not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this : where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum. According to the construction that has been long put upon the memorandum, the words “unless general or the ship be stranded” are to be considered as an exception out [\*35] \* of the exception as to the amount of an average or partial

No. 67.—*Wells v. Hopwood*, 3 Barn. & Ad. 35, 36.

loss provided for by the memorandum, and, consequently, to leave the matter at large according to the contents of the policy ; and as every average loss becomes a charge upon the underwriters where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no, the true and legal sense of the word "stranding" is a matter of great importance in policies upon goods. In policies on ship, the memorandum is not found. In such policies the inquiry is, whether a loss arose by perils of the sea, and the question is consequently unfettered by any technical phrase. Upon the facts of this case, it appears to me that the event which happened to this ship is within the second branch of the rule as above proposed. If the rope had not slackened, and the wind had not been in such a direction as it was, the vessel would have remained safe during the night ; for although raised by the influx of the tide, she would at its ebb have grounded again on the soft and even bottom over which she had been placed. The events that occurred, unusual and accidental in themselves, caused the vessel to quit that station, and go in part to another, where, upon the ebbing of the tide, her forepart rested on a stony bank, so as to be above her remaining part, and to cause the straining by which the cargo was injured from the influx of water through the opening of the planks.

I should observe that my judgment in this case is not founded upon the fact of injury to the cargo, or of the want of injury to the ship ; I do not consider either of those circumstances as being properly an ingredient in the question.

The rule as proposed will probably be found \*consistent [\*36] with the cases quoted at the bar, and which it is not necessary for me to repeat. I will only observe, that the facts of the case of *Bishop v. Pentland*, 7 B. & C. 219 (31 R. R. 177) cannot, in my opinion, be distinguished in effect from those of the present case : it is the last decision on the subject. It cannot be decided that this is not a case of stranding, without overruling that decision. The rule as proposed upholds the judgment in that case ; and for the reasons given I think this is a case of stranding, and the verdict must be entered for the plaintiff.

*Judgment for the plaintiff.*

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Nos. 66, 67.—*Burnett v. Kensington; Wells v. Hopwood.*—Notes.

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#### ENGLISH NOTES.

The points settled by the former of the above cases as to the meaning of the memorandum are thus summarized by Arnould (*Ins.*, 6th ed., p. 823): “1. That all losses, in the nature of general average, are to be paid by the underwriter as though the policy did not contain the memorandum. 2. That the underwriter is liable for no particular average, or for none under the rates specified, unless the ship be stranded. 3. But that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist.”

As to what constitutes a stranding, the latter of the above cases contains an important exposition of the criterion. The dissenting judgment of PARKE, J., however, shows that the facts bring the case at least very near the line. Very shortly after the decision in *Wells v. Hopwood*, the case of *Kingsford v. Marshall* (1832), 8 Bing. 458, was decided by the Common Pleas. The vessel arriving in Dunkirk harbour, which at that time was a tidal harbour, nearly dry at low water, was moored fore and aft to the shore at the place where it was intended she should take the ground as the tide went out. She was at the same time, in order to prevent her settling over as the tide fell, fastened from the mainmast-head by a rope. Before she took the ground this rope broke; and after the ship had settled down it was discovered that, by coming in contact with some hard substance, holes had been made in her bottom and the cargo damaged. There was contradictory evidence as to whether the ship took the ground in the place and manner she would have done if there had been no accident to the rope. The jury were directed that if the ship took the ground at the very place where it was intended she should at the time she was moored, there was no stranding within the meaning of the policy; but if in consequence of the breaking of the rope, or any other casualty, the ship took the ground, not in the place where it was intended she should settle by the ebbing of the tide, but in some other and different place, then there was a stranding. The jury found for the defendant, thereby adopting the former alternative; and a new trial was moved for on the ground of misdirection. The Court, by a considered judgment delivered by TINDAL, Ch. J., discharged the rule. “It has been settled,” he says, “by various decided cases that by the term ‘stranding’ neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say that when a vessel, in the course of a voyage insured, is sailing in a tide-river, or puts into a tide-harbour, the taking

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the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding within the meaning of the policy. Otherwise, at every ebb of the tide, there would be a stranding; and the memorandum intended for the security of the underwriter against partial losses upon perishable commodities would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason of the ship discharging her cargo in a tide-harbour. The mere taking of the ground, therefore, in a tide harbour, in the place intended by the master and crew, or the proper officers of the harbour, cannot, upon any principle of construction or common sense, be held to constitute a stranding. What more, then, is necessary? We think a stranding cannot be better defined than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause.” Then after referring to *Carruthers v. Sydebotham* (cited p. 204, *supra*), *Barrow v. Bell* (p. 204, *supra*), *Bishop v. Pentland* (p. 204, *supra*), and *Wells v. Hopwood* (p. 200 *et seq.*, *supra*), he continued: “All these cases were decided upon the principle that the taking the ground was occasioned by some extraneous and accidental cause, and was not a taking of the ground in the usual course of navigation. We think the attention of the jury, in the present case, was called to the very point to which it ought to have been directed, viz. whether the grounding was such as the master and crew intended, that is, merely by the ebbing of the tide, in the ordinary course of navigation; or whether the grounding in the particular spot where she took the ground was the effect of accident. Upon the facts before them, we think the jury found a right verdict.”

A comparatively recent case in which the foregoing and other cases are fully considered is *Letchford v. Oldham* (C. A. 1880), 5 Q. B. D. 538, 49 L. J. Q. B. 458, 28 W. R. 789. Cargo was insured free from average “unless the ship be stranded.” The ship, in proceeding to her port in a tidal harbour, on a tide in which she expected to reach the quay, grounded before reaching the quay on a small bank about twenty feet from the quay, and on settling down was found to be lying in a strained position, with her back on the bank and her head in a ditch beside it. The bank and ditch had been caused by paddle steamers going out at low tide, and their existence was unknown at the time of grounding. It was held by the Court of Appeal, affirming the judgment of FIELD, J., that this was a stranding. BRETT, L. J., said: “I accept the definitions given by Lord TENTERDEN in *Wells v.*

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*Hopwood*, and by TINDAL, Ch. J., in *Kingsford v. Marshall*. Applying the definition of TINDAL, Ch. J., to other cases, I do not think it necessary to apply exactly the same words which the learned Chief Justice used in that case to other cases which may differ on the facts. The words which he uses are, ‘where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause.’ In applying this definition to the case now under consideration, we may paraphrase it by saying ‘not from usual causes ordinarily incident, but from an unusual cause.’ COTTON, L. J., said: “I think that the reasonable conclusion is that this was an unusual state of the harbour, caused by an extraneous or accidental cause. Then the case comes within the definition of stranding given by TINDAL, Ch. J., in *Kingsford v. Marshall*.” THESIGER, L. J., said: “The inference drawn, and I think properly drawn, by FIELD, J., from the facts proved, was that the trench and bank were due to an accidental as well as artificial cause temporarily and recently arising, and that the bed of the harbour was not in its usual or ordinary state and condition. Under such circumstances, and upon the principles laid down by TINDAL, Ch. J., and other Judges, it appears to me that the judgment for the plaintiff was right.”

In the case of *The Glenlivet, The Glenlivet Steamship Co. v. Titcombe* (C. A. 1893), 1894, P. 48, 63 L. J. P. D. & A. 45, 69 L. T. 706, 42 W. R. 97, the question arose under the clause in an insurance of goods, “warranted free from average under three per cent unless general or the ship be stranded, sunk, or burnt.” The vessel was a steamer, and the coal in certain of the coal bunkers caught fire; but the fire was extinguished with the result only of some damage to the plates of the bunkers, and a quantity of the coal being converted into coke. It was held by the Court of Appeal that this did not constitute burning of the ship in the popular sense, and that the warranty was not broken.

#### AMERICAN NOTES.

These cases are cited in 2 Parsons on Marine Insurance, p. 72.

The mere fact that a vessel is high and dry at low tide does not constitute a total loss. *Peele v. Merch. Ins. Co.*, 3 Mason (U. S. Circ. Ct.), 42; *Wood v. Lincoln, &c. Ins. Co.*, 6 Massachusetts, 479; *Patrick v. Com. Ins. Co.*, 11 Johnson (N. Y.), 9; *King v. Middletown Ins. Co.*, 1 Connecticut, 201.

Parsons says of the phrase, “or the ship be stranded:” “Both in England and this country it seems to be settled that if the ship be literally stranded, that is enough, without much reference to the length of time that she remains on shore, or any regard to the effect of this stoppage. It is true that the Courts say it is not enough that the ship did just ‘touch and go;’ her

No. 68. — Lewis v. Rucker, 2 Burr. 1167. — Rule.

course must be arrested and all progressive motion must cease. And in one case, where a vessel struck on a rock, which made a hole in her bottom, whereby the cargo was damaged, it was held not to be a stranding, because the course of the vessel was not delayed." Citing *Lake v. Columbus Ins. Co.*, 13 Ohio, 48; 42 Am. Dec. 188, citing *Wells v. Hopwood*.

SECTION VI. — *Construction.*

(4) VALUED POLICY.

No. 68. — LEWIS v. RUCKER.

(1761.)

No. 69. — IRVING v. MANNING.

(1847.)

No. 70. — BARKER v. JANSON.

(1868.)

RULE.

A VALUED policy is one which states the value, as between the insured and insurers, of the interest of the insured in the subject-matter. This valuation is conclusive between the parties as the standard of indemnity, whether the loss is total or partial, except in the case of fraud.

**Lewis v. Rucker.**

2 Burr. 1167-1173.

*Insurance. — Valued Policy.*

A valued policy of insurance is not to be considered as a wager policy. [1167]

A rule having been obtained by the plaintiffs (the insured) for the defendant (the insurer) to show cause why a verdict given for the defendant should not be set aside, and a new trial had,

The Court, after hearing the matter fully debated by the counsel on both sides, took time to advise.

And Lord MANSFIELD now delivered their resolution: in doing which, he stated everything requisite to be known, in so full and

No. 68.—**Lewis v. Rucker, 2 Burr. 1167, 1168.**

ample a manner as to render it quite unnecessary, and even impertinent, for me to pretend to prefix any preface or introduction to it.

What he said was to the following effect:—

This was an action brought upon a policy, by the plaintiffs, for Mr. James Bourdieu, upon the goods aboard a ship called the *Krow Martha*, at and from St Thomas Island to Hamburgh, from the loading at St. Thomas Island, till the ship should arrive and land the goods at Hamburgh.

The goods (which consisted of sugars, coffee, and indigo) were valued at £30 per hogshead, the clayed sugars, and £20 per hogshead, the Muscavado sugars; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average under £5 per cent, and all other goods free from average under £3 per cent, unless general or the ship be stranded.

In the course of the voyage the sea water got in; and when the ship arrived at Hamburgh, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately, and they were accordingly sold; and the difference between the price which they brought by reason of the damage, and that which they might then have sold for at Hamburgh, if they had been sound, was as £20 0s. 8d. per hogshead is to £23 7s. 8d. per hogshead (*i.e.*, if sound, they would have been worth £23 7s. 8d. per hogshead; as damaged, they were only worth £20 0s. 8d. a hogshead).

The defendant paid money into Court by the following rule of estimating the damage: he paid the like proportion of the sum at which the sugars were valued in the policy, as the price of the

damaged sugars bore to sound sugars at Hamburgh (the  
[\* 1168] \* port of delivery). All this was admitted at the trial;

though perhaps upon an accurate computation there may be a mistake of about 17s. upon the money paid in. But no advantage was attempted to be taken of this slip at the trial: it was admitted that the money paid in was sufficient, if the rule by which the defendant estimated the loss was right; and the only question at the trial was, “by what measure or rule the damage (upon all the circumstances of this case) ought to be estimated.”

To distinguish this case, under its particular circumstances, out of any general rule, the plaintiff's counsel called Mr. Samuel Chollett, clerk to Mr. Bourdieu, who proved that upon the 15th of February (the time of the insurance) sugars were worth at Lon-

## No. 68.—Lewis v. Rucker, 2 Burr. 1168, 1169.

don and Hamburgh £35 a hogshead; that the proposal of a congress to be holden, and the expectation of a peace, had on a sudden sunk the price of sugars; that before the ship arrived at Hamburgh, and before he could know that the sugars had received any damage, Mr. Bourdieu had sent orders “that the sugars should be housed at Hamburgh, and kept till the price should rise above £30 a hogshead;” that he had many hundred hogsheads of sugar lying at Amsterdam, to which place he sent the like orders; that, in fact, the congress not taking place, sugars arose £25 per cent. That what he sold of the sugars he had at Amsterdam brought £30 per hogshead and upwards; that he might have sold these sugars at the same price, if they had been kept according to his orders: and the only reason why they were not kept was, because they were rendered perishable from the sea water which had got in. Therefore, said they, the necessity of an immediate sale, and the consequence thereof, ought to be computed into the damage.

The special jury (amongst whom there were many knowing and considerable merchants) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present, and formed their judgment from their own notions and experience, without much assistance from anything that passed.

The counsel for the plaintiff, in the outset, chiefly rested upon the particular circumstances of this case.

The counsel for the defendant offered to call witnesses to prove the general usage of estimating the quantity of damages where goods are injured.

I was at first struck with the argument “that the immediate necessity of selling in this case might be taken into consideration as an exception to the general rule,” and proposed

\* that the cause might be left to the jury upon that point. [\* 1169] Then Mr. Winn, for the defendant, argued “that the necessity of selling, and the consequence thereof, ought not to be regarded;” and what he said had so much weight, that it very much changed my way of thinking.

There was nothing to sum up; but the jury asked whether I would give them any directions. I said I left it to them, “whether the difference between the sound and the damaged sugars at the port of delivery ought to be the rule; or whether the necessity of

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an immediate sale (certainly occasioned by the damage), and the loss thereby, should be taken into consideration." I told them though it had struck me at first that this case might be an exception, yet what the counsel for the defendant had said to the contrary seemed to have great weight.

The counsel for the plaintiff, not having replied nor gone into the general argument, upon an apprehension that my opinion was with them upon the particular circumstances of this case, were dissatisfied with the verdict, and said they would try the other cause in the paper upon the same policy; but, instead of that, they have moved for a new trial in this cause, which I am extremely glad of.

No fact is disputed; the only question is, "whether (all the facts being agreed) the jury have estimated the damage by a proper measure."

To make the matter more intelligible, I will first state the rule by which the defendant and jury have gone, and then I will examine whether the plaintiff has shown a better.

The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price in money, which either the sound or damaged goods bore in the port of delivery. He says, the proportion of the difference is equally the rule whether the goods come to a rising or a falling market. For instance, suppose the value in the policy £30 — they are damaged, but sell for £40; if they had been sound they would have sold for £50 — the difference is a fifth: the insurer then must pay a fifth of the prime cost, or value in the policy (that is £6). *E converso*, if they come to a losing market, and sell for £10 being damaged, but would have sold for £30 if sound, the difference is one-half: the insurer must pay half the prime cost, or value in the policy (that is £15).

[\* 1170] \* To this rule two objections have been made.

1st objection. That it is going by a different measure in the case of a partial, from that which governs in the case of a total loss; for, upon a total loss, the prime cost, or value in the policy, must be paid.

Answer. The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage: the insurer engages, so far as the amount of the prime cost, or value in the policy, "that the thing shall come safe;" he has

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nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset; he has no concern in any subsequent value.

So, likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost: as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold.

But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but if you can fix whether it be a 3rd, 4th, or 5th worse, the damage is fixed to a mathematical certainty. How is this to be found out? Not by any price at the outset port; but it must be at the port of delivery, where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it equally shows whether the damaged goods are a 3rd, a 4th, or a 5th worse than if they had come sound; consequently, whether the injury sustained be a 3rd, 4th, or 5th of the value of the thing, and as the insurer pays the whole prime cost if the thing be wholly lost, so, if it be only a 3rd, 4th, or 5th worse, he pays a 3rd, 4th, or 5th of the value of the goods so damaged.

2nd objection. The next objection with which this case has been much entangled is taken from this being a valued policy.

I am a little at a loss to apply the arguments drawn from thence. It is said “that a valued is a wager policy (like interest or no interest): if so, there can be no average loss, and the insured can only recover as for a total, abandoning what is saved, because the value specified is fictitious.”

\* Answer. A valued policy is not to be considered as a [\* 1171] wager policy, or like “interest or no interest:” if it was, it would be void by the Act of 19 Geo. II., c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity.

If it be undervalued, the merchant himself stands insurer of the

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No. 68.—**Lewis v. Rucker, 2 Burr. 1171, 1172.**

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surplus. If it be much overvalued, it must be done with a bad view, either to gain, contrary to the 19th of the late King, or with some view to a fraudulent loss; therefore the insured never can be allowed in a Court of justice to plead that he has greatly overvalued, or that his interest was a trifle only.

It is settled "that upon valued policies the merchant need only prove some interest, to take it out of 19 Geo. II., because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing." But if it should come out in proof that a man had insured £2000 and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the Act of Parliament may be defeated.

There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion.

The effect of the valuation is only fixing, conclusively, the prime cost. If it be an open policy, the prime cost must be proved: in a valued policy, it is agreed.

To argue "that there can be no adjustment of an average loss upon a valued policy" is directly contrary to the very terms of the policy itself. It is expressly subject to average if the loss upon sugars exceed £5 per cent; if it was not, the consequence would not be that every partial loss must thereby become total: but the event to entitle the insured to recover would not happen unless there was a total loss. Consequently, the plaintiffs in this case would not be entitled to recover at all, for there is no colour to say this was a total loss. Besides, the plaintiffs have taken to the goods, and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend that they ought to be paid the whole value in the policy, upon one of two grounds.

[\* 1172] \* 1st, Because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost (or value in the policy). Here the damaged sold at £20 0*s.* 8*d.* per hogshead; and the underwriter should make it up £30.

Answer. It is impossible this should be the rule. It would involve the underwriter in the rise or fall of the market: it would subject him, in some cases, to pay vastly more than the loss; in

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others, it would deprive the insured of any satisfaction, though there was a lease.

For instance, suppose the prime cost or value in the policy £30 per hogshead; the sugars are injured; the price of the best is £20 a hogshead; the price of the damaged is £19 10s. The loss is about a fortieth, and the insurer would be to pay above a third.

Suppose they come to a rising market, and the sound sugars sell for £40 a hogshead, and the damaged for £35, the loss is an eighth; yet the insurer would be to pay nothing.

The 2d ground upon which the plaintiff contends that the £30 should be made up, is, that it appears the sugars would have sold for that price if the damage from the sea water had not made an immediate sale necessary.

The moment the jury brought in their verdict, I was satisfied that they did right in totally disregarding the particular circumstances of this case, and I wrote a memorandum, at Guildhall, in my note-book “that the verdict seemed to me to be right.”

As I expected the other cause would be tried, I thought a good deal of the point, and endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustments. The point has now been very fully argued at the bar; and the more I have thought, the more I have heard, upon the subject, the more I am convinced that the jury did right to pay no regard to these circumstances.

The nature of the contract is, “that the goods shall come safe to the port of delivery; or if they do not, to indemnify the plaintiff to the amount of the prime cost, or “value in the policy.” If they arrive, but lessened in value through damages received at sea, the nature of an indemnity speaks demonstrably that it must be by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been in if the \* goods had arrived free from damage; [\* 1173] that is, by paying such proportion or aliquot part of the prime cost, or value in the policy, as corresponds with the proportion or aliquot part of the diminution in value occasioned by the damage.

The duty accrues upon the ship’s arrival and landing her cargo at the port of delivery: the insured has then a right to demand satisfaction. The adjustment never can depend upon future events

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Nos. 69, 70. — **Irving v. Manning; Barker v. Janson, L. R. 3 C. P. 303.**

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or speculations. How long are they to wait? a week, a month, or a year?

In this case the price rose; but if the congress had taken place, or a peace had been made, the price would have fallen. The defendant did not insure "that there should be no congress or peace." It is true Mr. Bourdieu acted upon political speculation, and ordered the sugars to be kept till the price should be £30 or upwards; but no private scheme or project of trade of the insured can affect the insurer; he knew nothing of it. The defendant did not undertake that the sugars should bear a price of £30 a hogshead.

If speculative destinations of the merchant, and the success of such speculations, were to be regarded, it would introduce the greatest injustice and inconvenience. The underwriter knows nothing of them. The orders here were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price; and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery.

We are of opinion that the plaintiffs are not entitled to have the price for which the damaged sugars were sold made up £30 per hogshead; and it seems to us as plain as any proposition in Euclid that the rule by which the jury have gone is the right measure.

*The rule must be discharged.*

### **Irving v. Manning.**

6 C. B. 391 (s. c. 1 H. L. Cas. 817).

This case is fully dealt with under No. 3 of "ABANDONMENT," 1 R. C. 23.

### **Barker v. Janson.**

L. R. 3 C. P. 303-308 (s. c. 37 L. J. C. P. 105; 17 L. T. 473; 16 W. R. 399).

[303] *Marine Insurance. — Valued Time-policy. — Estimated Value.*

The value of the ship insured, stated in a valued time-policy, is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value.

A ship was insured by a valued time-policy, and its value stated in the policy was £8000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have

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exceeded its value when repaired. During the continuance of the risk the ship was totally lost. In an action against the underwriters:—

*Held*, that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the value of the ship as stated in the policy was conclusive between the parties.

Declaration against an underwriter as for a total loss on a valued time-policy of insurance on the ship *Sir William Eyre*, by which the ship was insured from and after thirty days after arrival at Calcutta, for and during the space of three calendar months, for £6000, the ship being valued at £8000.

Pleas, amongst others, denying the policy, the interest of the parties in whom interest was alleged in the declaration, and that the ship was lost during the continuance of the risk.

The case was tried before MONTAGUE SMITH, J., at the sittings in London after Michaelmas Term, and the following facts were proved.

The plaintiffs were the owners of a ship, the *Sir William Eyre*, which sailed from England for New Zealand in 1862, and was at that time worth more than £8000. At New Zealand it was driven on shore and greatly injured. There being no means of repairing it there, the ship, after some delay, sailed to Calcutta, and arrived there on the 5th of June, 1864. She was then examined, and it was found that the injuries she had received were such that the cost of repairs would exceed her value when repaired. The vessel had been insured for her full value for the voyage to New Zealand, and the plaintiffs thereupon gave notice of abandonment to the underwriters; but the delay at New Zealand having arisen from causes which the plaintiffs might have prevented, the notice of \*abandonment was held by this Court in *Potter* [\*304] v. *Campbell*<sup>1</sup> too late, but the plaintiffs recovered £7000 as for a partial loss. On the 14th of July, 1864, while the ship

<sup>1</sup> This was an action on a previous policy of insurance on the same ship which came before the Court as a special case, the question for the Court being whether notice of abandonment had been given in time. The injury to the ship was sustained at New Zealand, but there being no means of ascertaining the extent of the injury there, it was decided to take the ship to Calcutta for that purpose: she was, however, detained at New Zealand for several months for want of funds to pay penalties which had been incurred by breaches of the Passengers Act. On her arrival at Calcutta, it was ascertained that the expense of her repair would exceed her value when repaired, and the owners immediately gave notice of abandonment. The Court held that the delay at New Zealand having been occasioned by the fault of the master, who was the agent of the plaintiffs, was unreasonable, and that the notice of abandonment was therefore too late

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was at Calcutta, the plaintiffs, who were not aware of the accident, insured the vessel for £6000, by a valued time-policy, the time of the policy being for three calendar months from and after thirty days after the vessel's arrival at Calcutta, and the value of the ship being stated in the policy to be £8000. The defendant was one of the underwriters of the policy for £200. During the continuance of the policy, and before any repairs had been executed, the ship was wholly destroyed by a storm. The jury found that the *Sir William Eyre* was a ship at the time of the storm, and a verdict was entered for the plaintiffs as for a total loss, with leave to the defendant to move to enter a nonsuit, or a verdict for the defendant on the grounds that the policy did not attach, the *Sir William Eyre* having, in effect, ceased to be a ship before its arrival at Calcutta, or to reduce the damages on the ground that the value stated in the policy, being enormously above its true value, could be reopened.

Watkin Williams (Cohen with him) moved for a rule, pursuant to the leave reserved. After the finding of the jury it must be admitted that she was not a wreck at the time the policy attached, but was correctly described as a ship, but she was not worth repairing, and therefore, for all practical purposes, had ceased to exist as a ship. It was decided in *Adams v. Mackenzie*, 13 C. B. (N. S.) 442,

32 L. J. C. P. 92, that a constructive total loss is a total loss.

[\* 305]    [\* BOVILL, Ch. J.—Here there was no constructive total loss, because notice of abandonment was not given in time.]

WILLES, J.—If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is a notice of abandonment there is not even a constructive total loss.]

The main question in this case is whether the defendant is bound by the valuation of the ship contained in the policy. There is authority for saying that if the whole of the goods named in the policy are not subjected to the risk, the underwriter is not concluded by the amount mentioned in the policy, and if the parties estimate the value in ignorance of the true state of the case, they are not bound by such estimate.

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[WILLES, J.—Take the case of an ordinary voyage-policy from New Zealand to Calcutta, and suppose that the vessel has been injured at New Zealand just short of the point which would admit of her being abandoned, but so that when she gets to Calcutta £9000 will have to be expended on repairs, if she be destroyed on the voyage do you say that the underwriter is entitled to leave £9000 deducted from the amount at which the vessel is valued in the policy?]

The valuation ought not to stand if it does not carry out the intention of the parties. There is no case, indeed, in which the question of value has been reopened, except on the ground of fraud, but several works of authority say it may be reopened in the case of enormous overvaluation: Arnould on Marine Insurance, 3d ed. p. 292; Benecke on the Principles of Indemnity, p. 142. In this case the plaintiffs have already recovered £7000 on other policies, and if they recover the £6000 they claim on this policy they will have made a large profit out of the destruction of their ship.

[WILLES, J.—How is this case distinguishable from *Ircing v. Manning*, 1 H. L. C. 287?]

In that case the vessel was of the value stated in the policy at \* the commencement of the risk, though not at [\*306] the time of the making of the policy, and the amount named as its value was therefore at one time at risk; here, however, it never was at risk at all.

BOVILL, Ch. J.—The first question in this case we have already disposed of in the course of the argument. The second question would be one of considerable importance if it were still open for discussion. There is no doubt, however, now that the parties may use either an open or a valued policy. In this case both parties have agreed upon a time-policy (in which there is no warranty of seaworthiness), and have further agreed that, whatever its condition may have been at the time the policy attached, they will treat the value of the vessel as of a certain amount: both parties acting in good faith are willing to be bound by that valuation. If such be the agreement of the parties, upon what principle would the Court be justified in setting it aside? An exorbitant valuation may be evidence of fraud, but when the transaction is *bonâ fide*, the valuation agreed upon is binding. I think, therefore, that there should be no rule.

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WILLES, J. — I am of the same opinion. The question comes to this, whether, where a valued time-policy has been made upon a ship in distant parts without any express condition as to the state of repair of the vessel (it being settled that there is no implied warranty with respect to that), the underwriters are entitled to a deduction on its being shown that it would have cost a large sum of money on repairs to make her a complete vessel. No authority has been cited for it, and I never heard of underwriters claiming such a deduction; nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake to entitle the parties to reopen a contract of valuation must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract. The truth is, that the underwriters entered into the contract without caring to know whether the ship was in repair or not. Then it is said that the defendant's view is

supported by several works of authority. It cannot, however, [\*307] ever, fraud apart, make any difference that the vessel

has been enormously overvalued, except in respect of the statute 19 Geo. II., c. 37. Apart from statute, parties could make what wagers they liked with respect to vessel's. That Act forbids insurances by way of wager, but the law remains as it was before where the insured has an interest in the vessel, and there is no wager. The meaning of the authors referred to, therefore, must be that an enormous overvaluation is proof of either fraud or wagering. Here there was no wager, the insurance having been *bonâ fide*; and it having been settled by *Irving v. Manning*, 1 H. L. C. 287, that valued policies are valid, if there be no fraud or wagering, I think it would be wrong to raise any doubt in this case by granting a rule. The case of an ordinary policy on a vessel "at and from," in which there would be a warranty of seaworthiness in case she sailed, but the vessel being distrained before sailing, thousands of pounds which might be required to make the vessel fit for sea are not expended, must be a case that has often occurred, and the fact that no claim has been ever made by underwriters to deduct the expense of such repairs, shows the understanding that has existed on this subject in the mercantile world. In fact, as pointed out by PATTESON, J., in *Irving v. Manning*, 1 H. L. C., at p. 307, so long as underwriters are willing to adhere to the system of valued

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policies, they must, where there has been no fraud, pay the stipulate amount.

**KEATING, J.**—I also think there should be no rule. Mr. Williams admits that there is no case to be found in which the valuation in such a case as the present has been reopened in the absence of fraud. It seems very undesirable to establish any precedent for so doing.

**MONTAGUE SMITH, J.**—I am of the same opinion. It has been found convenient that the value of the ship should be agreed on, and stated in the policy, in order to avoid such inquiries as that now brought before us. If we were to grant this rule, it would become a question of degree in each case whether the difference in value was sufficient to entitle the parties to reopen the valuation. A thousand things might lessen the value of a vessel between the \* time of a policy being made and the time [\* 308] of its attaching, such as natural decay, worms, or the ship becoming a drug in the market; and all the evils intended to be avoided by this kind of policy would arise again. The estimated value, if excessive, may often be evidence of fraud, or of an intention to make a wagering policy; but here it is admitted that there was no intention to value the vessel beyond what was reasonable and fair. I think there is no pretence, either, for saying that there was a mistake: it is a misuse of the term, for the intention was to avoid all questions as to what was the real value of the ship, and both parties were aware that it could not at the time be ascertained with certainty what that value was.

*Rule refused.*

#### ENGLISH NOTES.

As to whether a policy is valued or not, there is seldom room for question, the common printed form of policy containing a clause to the effect that the subject-matter as between the assured and assurers shall be “valued at . . .” And the blank in this place being filled up by a figure, that is a sufficient valuation. In the two following cases the policy as filled up left room for argument whether it was valued or not.

In *Wilson v. Nelson* (1864), 5 B. & S. 354, 33 L. J. Q. B. 220, in the blank after “valued at” were inserted in writing the words “as under.” After these words the print went on with the exceptions, suing and labouring clause, and the common memorandum, after which were inserted in writing the words “on freight warranted free of caption, piracy, detention, or the consequence of any agreement therat.” In the margin, nearly opposite, but in the same handwriting, “£1300” was

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written in figures. It was contended that the policy was valued at £1300. But the Court held that it was not. The grammatical meaning of the policy (per BLACKBURN, J.) was that it was intended to insure “£1300 on freight, not freight valued at £1300.” Parties (said CROMPTON, J.) who wish to make a policy a valued one must express that on its face.

In *Asfur v. Blundell* (1895), 1895, 2 Q. B. 196, 64 L. J. Q. B. 573, 73 L. T. 30 (affirmed 1896, 1 Q. B. 123, 65 L. J. Q. B. 138, 73 L. T. 648, 44 W. R. 130), a blank was left for the valuation, and at the end of the policy words were written in as follows: “£2000 on profit on charter,”—the interest insured not being otherwise described. The policy was held by MATTHEW, J., not to be a valued one; and it being otherwise shown that the profit at risk was £790 only, the plaintiffs were only entitled to recover this sum. But they were held entitled also to a return of premium for short interest in respect of the balance of the £2000 which was never at risk.

Under a valued policy it is sufficient for the insured to prove interest, without proving the amount of interest. *Feise v. Aguilar* (1811), 3 Taunt. 506, 12 R. R. 695.

It frequently happens that the value of the property at the time of loss, especially in the case of an insurance on ship, which by the expenditure of stores or otherwise may have much deteriorated by the ordinary incidents of the venture, is much less than the value placed upon it in the policy. It is nevertheless well settled that, unless fraud is shown, the valuation is conclusive. Extreme instances in the case of an insurance of ship are *Shaw v. Felton* (1801), 2 East, 109, 6 R. R. 394, 13 R. C. 631; *Lidgett v. Seereton* (1871), L. R. 6 C. P. 616, 40 L. J. C. P. 257, 24 L. T. 942, 19 W. R. 1088; and *Woodside v. Globe Marine Insurance Co.* (1895), 1896, 1 Q. B. 105, 65 L. J. Q. B. 117, 73 L. T. 626, 44 W. R. 187.

A valuation of freight is *prima facie* calculated upon all the goods the ship is intended to carry upon the voyage insured. In the case of a seeking ship, the valuation is not conclusive as to the amount of freight at risk, since the risk can only attach to goods on board, or contracted to be shipped. And if only part of a cargo is shipped, the insured can only recover a proportion of the valuation, having regard to the proportion which the amount shipped bears to the intended cargo. *Forbes v. Aspinall* (No. 48 of “Insurance”), 13 R. C. 673. The principle of that case is explained by BARNES, J., in *The Main* (No. 49 of “Insurance”) 13 R. C. 681, to be not, in strictness, an opening of the policy, but a reduction in proportion to the amount of cargo shipped, the valuation still being held binding on what was in fact shipped. See also *Denoon v. Home & Colonial Assurance Co.*, cited in notes to Nos. 48

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and 49, 13 R. C. 689; *Hydarnes Steamship Co. v. Indemnity Mutual, &c. Co.*, cited in notes to Nos. 32 and 33, 13 R. C. 584.

So, where there is a valuation of “cargo” to be shipped,—as where it appears that the intention is to protect homeward cargo on a vessel which at the time of the insurance is on the outward voyage,—it may be inferred that the valuation is intended to apply to a full cargo; and in this case it is not conclusive as to the amount of cargo which is at risk, although if a full cargo had been shipped it would be conclusive of the value. *Rickman v. Carstairs* (1833), 5 B. & Ad. 651, cited 13 R. C. 582, 586. There may, in such a case, be some difficulty in ascertaining the proportion, but that may doubtless be solved on the principle of *Forbes v. Aspinall* as explained in *Denoon v. Home & Colonial Assurance Co.* And see *Tobin v. Harford*, No. 37, 13 R. C. 598.

Where there is a partial loss, the assured on a valued policy is entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss bears to the whole value in the policy. *Goldsmid v. Gillies* (1813), 4 Taunt. 803, 14 R. R. 671; *Tunno v. Edwards* (1810), 12 East, 488, 11 R. R. 458.

Where the insured has already recovered a sum by way of indemnity for the loss, he cannot in an action upon a valued policy recover more than the excess of the value stated above the amount which he has already recovered. So in *Bruce v. Jones* (1863), 1 H. & C. 763, No. 92, *post*, where a shipowner effected upon the same ship four policies of insurance, in which respectively the agreed value of the ship was stated to be £3000, £3000, £5000, and £3200, and upon a total loss had recovered under the first three policies sums amounting to £3126 13s. 6d., he was held, in an action upon the last policy, to recover only £73 6s. 6d., the balance of loss according to the valuation in the policy sued on. A curious consequence of this is that the whole sum recovered will be greater or less according to whether recourse is first had to the less or the greater valuation. If, for instance, a shipowner has insured in one policy £2000 on ship valued at £4000, and in another policy £4000 on ship valued at £6000: If, on a total loss, the former policy is put in suit first, he would recover £6000 in all. But if he first sued on the latter policy he would recover £4000; and this would be all, because if he afterwards brought an action on the former policy, he would be obliged to admit that he had received £4000, which according to the valuation would be a full indemnity.

More difficult questions arise as to whether a valuation is conclusive between the parties on a claim arising out of the contract, but not directly enforceable by an action upon the policy. Is the valuation necessarily conclusive for the purpose of assessing the claim by the insurer, who has paid a loss, to be subrogated to the right of the assured

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to indemnity from another source? The decision of COCKBURN, Ch. J., and his colleagues in *North of England Iron Steamship Insurance Association v. Armstrong* (1870), L. R. 5 Q. B. 244, 39 L. J. Q. B. 81, 21 L. T. 822, 18 W. R. 520, appears to answer the question in the affirmative. In that case the insurance office had paid £6000 as for a total loss on a valued policy of the defendant's ship which had been sunk by a collision. The defendant had subsequently recovered a sum of £5000 from the colliding vessel. In an action by the insurance company against the defendants to recover the whole of this sum on the footing that they were subrogated to the whole rights of the insured, it was held that the valuation was conclusive between the parties, and that although the ship lost had been really worth £9000, the insurers were entitled to the whole of the damages recovered from the colliding ship (see per Lord BLACKBURN in *Burnand v. Rodocanachi*, H. L. 1882, 7 App. Cas. 333, 342). Lord BLACKBURN, in the above case of *Burnand v. Rodocanachi* doubts whether the principle was rightly applied by Lord COCKBURN and his colleagues. In the case of *Burnand v. Rodocanachi* itself the question did not directly arise whether that decision should be overruled, the question in the latter case arising out of an indemnity paid under the Act of Congress (for distribution of the Alabama compensation money) which expressly provided against the benefit going to the insurer.

Where goods are fraudulently overvalued with intent to cheat the underwriter, the contract is entirely vitiated, and the insured upon it can recover nothing. *Haigh v. De la Cour* (1812), 3 Camp. 319, 13 R. R. 813. It has been frequently stated that fraud is the only ground for setting aside the valuation. But it has been also held that where a highly speculative value is placed on the profits of an adventure (whether in the valuation of "goods" or of profits *eo nomine*), that is a material circumstance to be disclosed to the underwriter. So that the non-disclosure may have an effect similar to that of fraud in the valuation itself. *Ionides v. Pender* (1874), L. R. 9 Q. B. 531, 43 L. J. Q. B. 227, 30 L. T. 547, 22 W. R. 884.

**AMERICAN NOTES.**

The first two principal cases are frequently cited in Parsons on Marine Insurance, and the first one in Duer, and the doctrine prevails in this country. *Harris v. Eagle Fire Co.*, 5 Johnson (N. Y.), 368; *Coolidge v. Gloucester M. Ins. Co.*, 15 Massachusetts, 341; *Patapsco Ins. Co. v. Biscoe*, 7 Gill & Johnson (Maryland), 293; 28 Am. Dec. 219; *Davy v. Hallett*, 3 Caines (N. Y.), 16; 2 Am. Dec. 241.

The general American doctrine is that "the valuation in a valued policy is held to be almost conclusive. The very purpose for which it is made is that the parties may be relieved from all necessity for inquiring into this value" 1 Parsons on Marine Insurance, p. 258, citing the *Irving* case, sus-

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tained by *Alsop v. Com. Ins. Co.*, 1 Sumner (U. S. Circ. Ct.), 451, where **STORY**, J., said: "I do not know that any overvaluation, however great, if it steers wide of a wager and a fraud, can be otherwise impeached." *Robinson v. Manuf. Ins. Co.*, 1 Metcalf (Mass.), 143; *Kane v. Com. Ins. Co.*, 8 Johnson (N. Y.), 229 ("well settled that the valuation in a policy is conclusive upon the underwriters, when there is no suggestion of fraud or imposition"); *Whitney v. Am. Ins. Co.*, 3 Cowen (N. Y.), 210; *Pleasants v. Maryland Ins. Co.*, 8 Cranch (U. S. Sup. Ct.), 53; *Cushman v. Northw. Ins. Co.*, 31 Maine, 487; *Boardman v. Boston M. Ins. Co.*, 146 Massachusetts, 142; *Lockwood v. Sangamo Ins. Co.*, 46 Missouri, 71; *Dumas v. U. S. Ins. Co.*, 12 Sergeant & Rawle (Penn.), 457.

In respect to *constructive* total loss, it has been held here that the actual and not the stated value is to govern. *Bradlie v. Maryland Ins. Co.*, 12 Peters (U. S. Sup. Ct.), 398, 399, where **STORY**, J., observed: "In respect to the mode of ascertaining the value of the ship, and of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this Court that the true basis of the valuation is the value of the ship at the time of the disaster; and that if after the damage is or might be repaired the ship is not, or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss. This was the doctrine asserted in the *Patapsco Ins. Co. v. Southgate*. 5 Peters, 604, in which the Court below had instructed the jury, that if the vessel could not have been repaired without an expenditure exceeding half her value at the port of the repairs, after the repairs were made, it constituted a total loss. This Court held that instruction to be entirely correct. It follows, from this doctrine, that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel, or not." Followed in *Fulton Ins. Co. v. Goodman*, 32 Alabama, 108; *Peele v. Merch. Ins. Co.*, 3 Mason (U. S. Circ. Ct.), 27, by **STORY**, J.

The contrary was preferred in *American Ins. Co. v. Ogden*, 20 Wendell (N. Y.), 287, by the Chancellor, but it did not necessarily enter into the decision. He quoted largely from *Deblois v. Ocean Ins. Co.*, 16 Pickering (Mass.), 312, and declared "I most fully concur."

The early rule in Massachusetts was also to the contrary, and the value stated in the policy was held to govern. *Deblois v. Ocean Ins. Co.*, 16 Pickering, 303; *Orrok v. Com. Ins. Co.*, 21 ibid. 456; *Allen v. Com. Ins. Co.*, 1 Gray, 154; *Heebner v. Eagle Ins. Co.*, 10 Gray, 131. But in *Boardman v. Boston Ins. Co.*, *supra*, it was held that in respect to valued freight the actual value is to control. **HOLMES**, J., said: "If therefore we are to follow the rule which has been applied in this Commonwealth for the purpose of determining whether there is a constructive total loss of a ship under a valued policy, there has been no constructive total loss of freight, and there could not be so long as a single ton remained which could be forwarded for less than about seven hundred and thirty-two dollars, or half the valued freight less the actual freight supposed to be lost. We have no disposition

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to depart from the rule so far as it is settled, but in the existing state of the decisions elsewhere it should not be extended. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 398, 399; *Irring v. Manning*, 1 H. L. Cas. 287, 306; *Stewart v. Greenock Ins. Co.*, 6 Ct. of Sess. Cas. (2nd series) 359; *Phillips Ins.*, § 15, 39 n. It is to be noticed further, that the reasons offered in *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 312, other than that abandonments for technical total losses are not to be favored, have no application here. The actual value of the vessel will fluctuate, according to the time when and place where the loss occurs. Furthermore, it is a matter of estimate, on which opinions may differ widely. It may well be said that such estimates are excluded by the agreement of the parties, and that as the only way of ascertaining whether the loss is more than half is by comparing the cost of repairs with some valuation, the valuation in the policy must be accepted. But in the case at bar there is no element of fluctuation or of valuation. If the freight of a whole homogeneous cargo is conclusively presumed to be worth the valuation in the policy, there seems to be no reason why the freight of one-half of it should not be presumed to be worth one-half of that valuation."

**No. 71.—HARMAN v. KINGSTON.**

(1811.)

**No. 72.—GLEDSTANES v. ROYAL EXCHANGE ASSURANCE CORPORATION.**

(1864.)

**RULE.**

WHERE goods are insured on ship or ships as may be declared, the declaration may be made after announcement of a loss, if there is interest in goods on board intended to be covered.

But if the insurance is on goods to be declared and valued, and the value is not declared until after the loss, the policy will be regarded as an open policy.

**Harman and others v. Kingston.**

3 Camp. 150-154 (13 R. R. 775).

*Insurance.—Goods to be declared and valued.*

[150] Where there is a policy on goods as may be thereafter declared and valued, the declaration of interest, to be available, must be communicated

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to the underwriters, or some one on their behalf, before intelligence is received of the loss. But the declaration of interest is not a condition precedent; and if none is made, the policy is then open instead of being valued; and upon proof of interest at the trial, the assured will be entitled to recover.

This was an action on a policy of insurance, dated 1st August, 1810, on goods by the ship *Maria*, "at and from Gottenburgh to port or ports of discharge in the Baltic." By a memorandum at the foot of the policy the insurance was declared to be "on sugar and cotton, as might be thereafter declared and valued."

The declaration alleged that the goods were duly declared and valued before the loss.

A clerk of the plaintiffs stated that on the 2nd of October, 1810, he wrote out and signed, by order of the assured, a specification of interest, with a valuation of the goods insured, on a separate piece of paper, which he wafered to the policy; but he could not swear that he had shown it to any of the underwriters, or to any other person, till after intelligence of the loss had been received.

The Attorney-General objected that this private memorandum of the clerk, which he had kept a secret from all the world, could not be considered a declaration of interest within the meaning of the policy. The object was to inform the underwriters, before a loss happened, of the particular goods insured, and of the value put upon them, that they might be protected \*from [\*151] any sinister practices on the part of the assured. But if this declaration were sufficient, it would be unnecessary to communicate any declaration till the day of trial, or there might be twenty declarations privately written and signed before the loss, and that one afterwards produced which, according to the event, would best suit the purpose of the parties.

Garrow and Bosanquet, *contra*, maintained that it was merely a question as to the credit of the witness. If he was believed, there had been a declaration made on the 2nd of October, and the loss did not happen till the 18th of November. The declaration of interest did not require the assent of the underwriters. This policy did not stipulate, as is sometimes done, that it should be authenticated by their initials. Had it been shown to them on the 2nd of October, they could not have objected to it; and therefore, if the witness spoke true, they were precisely in as good a situation as if, on that day, it had been shown to every one of them. *Henchman v. Offley*, 2 H. Bl. 345, *in notis* (3 R. R. 413), was cited as in point.

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Lord ELLENBOROUGH.—A declaration necessarily imports two parties,—the person who makes it, and the person to whom it is made. How can I consider an uncommunicated instrument a declaration? Had it been communicated to any person, or if it had been written on the policy, so that the party could not recede, perhaps that would have been sufficient. I allow that a declaration of interest is no contract, and does not require [\*152] the assent of the underwriters; but it must \*be communicated in such a manner that the assured cannot recede from it. Here there would have been no evidence that this instrument ever existed, if it had suited the assured to destroy it, or to substitute another in its place.

Garrow then proposed to prove the loading of the goods, and their value, as in the common case of an open policy.

Lord ELLENBOROUGH at first entertained some doubts whether this could be done; and whether, upon a policy of this sort, the declaration of interest is not a condition precedent, which must be fulfilled by the assured before the liability of the underwriters attaches: but, after further consideration, his Lordship said, I have now fully made up my mind that where there is an insurance on goods as may be thereafter declared and valued, this gives the assured a power, by duly declaring and valuing before the loss, to make it a valued policy; but that if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial.

The Attorney-General.—My Lord, I feel myself bound entirely to subscribe to that doctrine; and had I been aware that the plaintiffs could prove the interest, I should not have made any objection. . . .

#### *Gledstanes v. Royal Exchange Assurance Corporation.*

34 L. J. Q. B. 30-37 (s. c. 5 B. & S. 797; 11 L. T. 305; 13 W. R. 71; 11 Jur. (N. S.) 108).

[30]           *Insurance.—Declaration of Risk.—Knowledge of Loss.*

The plaintiffs were the London agents of an insurance company having an agent also in Calcutta: the defendants were a London insurance company. By a course of dealing between the plaintiffs' company and the defendants, an open policy was from time to time effected by the plaintiffs with the defendants, "lost or not lost, from Calcutta to the United Kingdom, on goods to cover the excess over £5000 which might be taken by the Calcutta agent of the plaintiffs' company in any one ship, on first-class ship or ships as may be

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declared." As soon as the Calcutta agent had ascertained that there was an excess of £5000 in any one ship on a policy granted by the plaintiffs' company, he wrote \* to the plaintiffs to appropriate such excess to the [\*31] current open policy effected with the defendants; and the plaintiffs, as soon as the letter reached London, declared to the defendants the name of the ship and the amount of excess, which were indorsed on the back of the policy. On the 15th of February, 1860, the Calcutta agent wrote to the plaintiffs notifying an excess in the ship *R. G.* On the 16th of March, 1860, a telegram was made known to the plaintiffs and the defendants,—"Calcutta, March 10, ship *R. G.* burnt, some cargo will be saved." On the 17th of March the plaintiffs appropriated the whole of the amount remaining on the then current policy of the defendants to other ships. On the 19th of March a policy in the usual terms, which was expressed "to succeed" the last current policy, was effected by the plaintiffs with the defendants. On the 21st of March the plaintiffs in due course received the letter from Calcutta of the 15th of February, and immediately notified to the defendants that the excess of £5000 on the *R. G.* would be appropriated to the policy of the 19th of March; and on the 26th of March, on receiving the full particulars from Calcutta, they indorsed the amount of excess on the policy, which the defendants disputed their right to do. *Held*, that the plaintiffs could recover the excess in the *R. G.* on the policy of the 19th of March, as the appropriation and declaration were sufficient; and that the fact of the loss of the *R. G.* being known to both parties at the time the policy was granted did not affect it, as it was not then known to the plaintiffs or the defendants that the plaintiffs' company had any excess of insurance on board.

Case stated by consent, without pleadings.

This was an action brought to recover £2715, as the amount of a partial loss alleged to have attached, under one or other of certain open policies, effected by the plaintiffs with the defendants, on goods insured in the sum of £7699 11s. 3d., whereof £4738 was declared on the policies hereinafter mentioned, by ship or ships, in respect of the cargo of the ship *Red Gauntlet*, which was totally lost by fire at Calcutta under the circumstances hereinafter set forth.

The plaintiffs are merchants in London, and act as the agents there of the Hong-Kong Insurance Company. This company is established at Hong-Kong, and carries on the business of marine insurance there and elsewhere, and they have an agent established at Calcutta with general authority to underwrite policies on their behalf.

The course of business of the company in taking risks at Calcutta, so far as it is material to the question that arises on this case, is as follows: Merchants at Calcutta intending to make consignments of merchandise, for example, to the United Kingdom,

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and being desirous of securing insurances upon the same with the company, make application to that effect to the agent of the company, some time before the goods are actually shipped, or even the name of the intended ship is known, or the precise quantity or particulars of the merchandise is defined ; and if the application is accepted, a slip naming the risk accepted in general terms, but without naming the ship or specifying the particulars of the merchandise, is delivered to the assured, and as soon as the particular ship is determined on a formal policy of insurance, expressed to be upon the whole amount of merchandise which the assured may consign by that particular ship, is drawn up and delivered to the assured. What quantity of merchandise is covered by such policy remains uncertain until the same is actually shipped.

Under these circumstances the company do not know at the time of issuing a policy of insurance, as above mentioned, what may prove ultimately to be the amount of risk taken by them on any particular ship ; and, not deeming it expedient to take upon themselves risks to a greater extent than £5000 upon any one ship, the plaintiffs, as their agents in London, effect, on their behalf, with the defendants and others, open policies of insurance to cover the several amounts, if any, which the company may have taken in excess of £5000 upon any one ship. The maximum amount of value to be insured in these policies is fixed therein, as will presently appear.

In accordance with the course of business, the plaintiffs effected a policy of insurance with the defendants, dated the 8th of [\* 32] October, 1858, numbered 22,122, \* for £7000, the subject of insurance being described and valued as follows : " Lost or not lost at and from Calcutta to a port in the United Kingdom, being on goods. Free of all average ; part of £10,000. To cover the excess of £5000 which may be taken by the Calcutta agent of the Hong-Kong Insurance Company on any one ship. Warranted to be shipped on or before the 31st of March, 1859." The ships were described as " first-class ship or ships as may be declared."

As a fact the Calcutta agent of the Hong-Kong Insurance Company had taken risks on goods which exceeded £5000 on single ships ; and from time to time as the plaintiffs received advices from the company to that effect, stating the names of the ships and the particulars of the amounts of excess on each ship,

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the plaintiffs made declarations of the amounts and names of the ships to the defendants, and indorsements were made of the declarations upon the back of the policy. (The indorsements on the back of the policy were set out, the last being dated the 16th of March, 1859.) The particulars of the subjects of risks covered by this policy were thus on the 16th of March, 1859, completed, the policy fully appropriated, or, as it is sometimes expressed, "consumed."

On the 12th of February, 1859, before the last-mentioned policy was fully appropriated, the plaintiffs proposed to effect a further policy of the same kind for £7000. This proposition was made by means of a memorandum which was indorsed on the back of the policy of the 8th of October, 1858, as follows: "12th February, £7000 to follow this;" and this proposal being accepted, another policy, numbered 3686/33 and dated February the 14th, 1859, was effected for £7000, being expressed to be "on goods, part of £1000, to cover the excess of £5000 on any one ship free of all average, to follow and succeed policy No. 22,122, 8th of October, 1858, warranted to be shipped on or before the 30th of June, 1859"—"ships" being inserted where the blank occurred for the name of the ship. This policy was in like manner appropriated by declarations indorsed thereon as before; the last of which, being upon part value of a policy on the ship *W. W. Smith*, was dated the 7th of November, 1859.

A similar policy was also opened by the plaintiffs with the defendants, numbered 7529, 30, and dated the 31st of March, 1859, also for £7000, "being upon goods part of £10,000, to follow and succeed policy No. 3686, dated the 14th of February, 1859, warranted to be shipped on or before the 31st of December, 1859," and a memorandum was indorsed on policy No. 3686 33, as follows: "31st of March, £7000 to follow this at 30/." In this policy of the 31st of March, 1859, the ships were described as "A 1, British built, or equal thereto." On the 7th of November, 1859, the first indorsement was made upon this policy, and was upon the remainder of the Hong-Kong Insurance Company's policy on the ship *W. W. Smith*, partly appropriated by the last indorsement on the preceding policy as above mentioned.

On the 16th of March, 1860, there remained still £5000 unappropriated upon the open policy dated the 31st of March, 1859.

On the same day the following telegram arrived in London by

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the Red Sea and India Telegraph, having been despatched from Calcutta six days previously:—

“At 6.27, Friday, the 16th of March, 1860, received the following message:—

“From Malta, dated 15. Time 8 P.M.

“To Lloyd’s, London.

“Ship *Red Gauntlet*, bound to London, burnt and scuttled, some cargo will be saved. Calcutta, March 10, 16—8.22 A.M.

“LLOYD, Calcutta.”

This telegram became known to the plaintiffs and defendants on the same day (16th of March).

On the 17th of March, 1860, the plaintiffs, in accordance with the course of business before described, appropriated the remaining £5000 upon the above-mentioned policy of the 31st of March, 1859, to insurances in excess of £5000 upon the ships *City of Manchester*, £2000, *Blenheim*, £2000, and *Agamemnon*, £1000, and on the same day the plaintiffs effected with the defendants three specific policies on behalf of the Hong-Kong Insurance Company: one on goods per *City of Manchester* for £3000, another on goods per *Agamemnon* for £4000, and a third on goods per *Blenheim* for £2000, parts of the risks in respect of the cargoes of those [\* 33] ships having already been placed \* upon the open policy just appropriated as above mentioned.

On the 19th of March, 1860, the plaintiffs effected a further policy for £10,000 to follow the policy of the 31st of March, 1859, which was expressed to be as follows: “Lost or not lost, at and from Calcutta to a port in the United Kingdom. Being on goods. Free of particular average, unless stranded, sunk, or burnt. To follow and succeed policy No. 7529 30, dated the 31st of March, 1859, warranted to be shipped on or before the 31st of December, 1860.” The ships being described simply as “ships.” The plaintiffs, in the mode that had been previously pursued when the prior policies were effected, indorsed on the policy No. 7529 80 the following memorandum, “£10,000 to follow the 17th of March at 30/,” as instructions for the said policy of the 19th of March, 1860, and the defendants initialed the memorandum as an acceptance of the risk.<sup>1</sup>

<sup>1</sup> The day on which this was done was disputed, and the statement in the case was therefore left open.

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On the 21st of March, 1860, the plaintiffs in due course received from the Calcutta agent of the Hong-Kong Insurance Company the following instructions, despatched from Calcutta on the 15th of February, 1860: "In our next by regular mail you will find particulars for insurances under our open policy for *Red Gauntlet* and *Surrey*." This was the first intimation received in England of any insurance by the Hong-Kong Insurance Company upon the *Red Gauntlet*.

The plaintiffs, immediately upon the receipt of these instructions from Calcutta, notified to the defendants that the declaration of insurance in excess of £5000 on the cargo of the *Red Gauntlet* would be made upon the last-mentioned policy when the particulars were received; the right to declare in respect of the *Red Gauntlet* was, however, disputed; and on the 26th of March, the plaintiffs having received advices from Calcutta that the Hong-Kong Insurance Company, as the fact was, had taken risks upon the cargo of the *Red Gauntlet* to the amount of £4738 in excess of £5000 upon that one ship, indorsed a declaration of that amount for the *Red Gauntlet*, on the back of the policy of the 19th of March, 1860, and gave notice of the same to the defendants. The defendants refused to accept or acknowledge such declaration, upon the ground that the burning of the *Red Gauntlet* was known to both parties before the policy was effected or applied for; the plaintiffs thereupon wrote opposite the declaration per the *Red Gauntlet* the words "in dispute," and after doing so, declared other risks upon the policy to the full amount, which were initialed by the defendants, but the words "in dispute" were not noticed by the defendants.

The plaintiffs on the 24th of March, 1860, before the last-mentioned policy was exhausted, and while there remained upwards of £5000 unappropriated upon it, effected a further policy with the defendants for £20,000 to follow the policy of the 19th of March, 1860; and a memorandum was indorsed on the policy of the 19th of March, 1860, as follows, "£20,000 to follow the 25th of March," such date being a mistake for the 24th of March.

Similar policies have been from time to time effected during the currency of the preceding policy, and there remains upon the last of such policies an amount unappropriated, more than sufficient to cover the amount of the *Red Gauntlet*.

The interest of the Hong-Kong Insurance Company and the

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validity of the insurances are admitted, as well as the loss, and that the goods were shipped on board the said ship, and that all warranties and conditions were complied with, except so far as the same may otherwise appear on this case; and it is agreed that the amount to be recovered by the plaintiffs (if any) shall be settled by an arbitrator to be named by the parties.

The question for the opinion of the Court was, whether the plaintiffs are entitled to recover in respect of the excess over £5000 taken by the Hong-Kong Insurance Company upon the cargo of the ship *Red Gauntlet*. If the Court should be of opinion that the plaintiffs are so entitled to recover, then the plaintiffs were to enter up judgment for the sum so to be settled as above mentioned, together with costs of suit, including costs of reference as to the amount. If the Court should be of the contrary opinion, the judgment was to be entered for the defendants with costs of suit.

Lush (Hannen with him), for the plaintiffs.—The [\*34] plaintiffs are entitled to recover \* for the excess in the *Red Gauntlet* on the policy effected on the 19th of March. The effect of the course of dealing is to make these successive policies but one continuous insurance; the object being that the plaintiffs should always have any excess over £5000 on any one ship reinsured from the time of sailing. The risk would attach on any particular ship in the order of sailing.

[COCKBURN, Ch. J.—I doubt that; the insurance is “on ships, as may be declared.”]

That construction is equally favourable to the plaintiffs. The declaration is only a notification to the defendants of the exercise of the power of appropriation, which is in the insured alone; the insurers having no power to reject any risk coming within the terms of the policy. *Harman v. Kingston*, 3 Camp. 150 (p. 232, *ante*). A declaration of the subject-matter of the insurance is no contract; it need not be assented to; in fact, the appropriation is the important step from which the assured cannot recede; and the declaration given to the insurers is simply information for their protection, and can only be given as soon as practicable by the course of post. The risk attached as soon as the appropriation was made, and by the course of dealing it was to be covered by whatever was the current policy at the time the notice of appropriation reached London.

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Bovill (Watkin Williams with him), for the defendants. — There was not here a continuous insurance; there was a break between the 17th of March, 1860, and the 19th; on the former day the current policy was filled up and exhausted, and there was therefore no policy for two days. Even assuming the policy to take effect from the 17th, that was after the loss, so that there was no risk on this ship on which it could attach.

[COCKBURN, Ch. J. — That argument might be valid if the defendants had not or could not insure lost or not lost.]

But on the 17th, taking the earlier date as most against the defendants, both parties had notice of the loss, and an insurance with notice of loss is void. The appropriation can have no validity without a declaration made to the defendants; on this, *Harman v. Kingston*, 3 Camp. 150 (p. 232, *ante*), is directly in the defendants' favour; for it was held, that, inasmuch as the declaration was not made till after the loss, the policy was not a valued policy.

[MELLOR, J. — It may be important that both parties should know as to value; but the risk is quite a different question. COCKBURN, Ch. J. — There must be an agreement as to valuation. SHEE, J. — The distinction taken in the case is against you; for the policy was held good without a declaration.]

Assuming, then, that the declaration relates back to the time the appropriation was made, still as the loss occurred before the declaration reached the defendants, and before the policy was effected, there was nothing on which it could attach.

Lush, in reply. — There was no knowledge of the loss in the present case. The knowledge that would vitiate a policy must, at least, be a knowledge of the loss of the subject-matter of insurance; here neither party knew whether the plaintiffs had any insurance, much less an excess in the ship *Red Gauntlet*. But even if they had this knowledge, that does not vitiate the policy, if the underwriter choose notwithstanding to execute the policy. *Mead v. Davison*, 3 Ad. & E. 303, 4 L. J. (N. S.) K. B. 193. The argument of the other side, that a declaration cannot operate if made after the loss, practically amounts to saying that they will only insure such ships of the plaintiffs as arrive safe. As soon as the risk is incurred, if the assured mean to appropriate, they must do so at once, and that was done in the present case. In 1 Arnould on Marine Insurance, p. 175 (p. 221, 2nd

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edit.), it is said, "As a general rule, the name of the ship ought to be declared before notice of loss; as, however, cases may occur in which it would not be possible, as when the assured does not ascertain the name of the ship till he hears of her loss, it is in no case a condition precedent to the plaintiff's right to recover on the policy." So, in *Robinson v. Touray*, 3 Camp. 158 (13 R. R. 781), it was held that a declaration of risk requires no assent, and need not be in writing, and that when a *bonâ fide* mistake had been made in the name of the ship, the declaration might be withdrawn, and the right ship substituted.

[\*35]    \*COCKBURN, Ch. J.—I am of opinion that judgment should be for the plaintiffs. I will first consider whether there was any sufficient policy of which the plaintiffs may avail themselves to recover for this loss. I think there was. It is true that the policy to which the risk on the goods in the *Red Gauntlet* was appropriated was effected at a time posterior to the appropriation. But I think we must take it that the appropriation in Calcutta (to be followed by a declaration in London) was made in anticipation of a policy to be afterwards effected in London; and if we look at the course of dealing between the parties this is clear, that it was intended that whenever the plaintiffs' principals, the Hong-Kong Insurance Company, from time to time became liable on insurances on goods in any one ship in an excess over £5000, they should be always covered as to the excess by reinsurance with the defendants. Mr. Bovill, indeed, did not deny that if the policy had been effected on the 16th of March instead of the 19th, although equally subsequent to the appropriation, the policy would have been sufficient to entitle the company on a proper appropriation to have the benefit of the insurance. But he said that the insurance was invalid, because, at the time the policy was effected, the *Red Gauntlet* was lost, to the knowledge of both parties. To this there are two answers. The first urged by Mr. Lush was to me conclusive: the loss of the ship was not the risk insured against, the risk depending on the contingency that the plaintiffs' principals had insured goods on board that ship and in excess of £5000. And whether this was the case or not was unknown to the plaintiffs and defendants at the time the policy was effected. But, secondly, the knowledge here was common to both parties, and if an underwriter chooses to insure when the subject-matter is lost, I can see no reason why he should not. He

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may have good reasons for taking the risk; and it may also be observed that the telegram spoke of part of the cargo being saved. On these grounds I think there is nothing in the facts of the case to vitiate the insurance.

The next question is, whether the fact of the declaration having been made to the defendants subsequently to the loss of the ship is any obstacle to the plaintiffs recovering. The policy gives the right to the assured to appropriate goods in any ship, but it is to be declared to the assurers; and it is said by Mr. Bovill that the risk does not attach until the declaration has been made; and if that were true in the present case the plaintiffs could not recover. But to put such a construction on the agreement of the parties would be to frustrate altogether the obvious intention of the whole proceeding, which was to secure to the Hong-Kong Company the certainty of being secured by reinsurance against the excess over £5000 in any one ship. But whether they had this excess in any particular ship could not be ascertained till the loading was complete and the vessel about to sail, and the appropriation being then made, the declaration could not be communicated to the defendants in less than about six weeks; so that if the defendants' contention were correct, during the whole of that time the plaintiffs would be altogether unprotected. I cannot suppose that that was what was meant by saying that the ship is to be declared. It may be that by declaring it meant that appropriation is to be made by some overt act from which the assured cannot recede, and that when that is done at Calcutta, that is sufficient without more. But without going that length, it is enough to say that, if the declaration must be made to the insurers, it is sufficient if it be made at the earliest convenient opportunity. By this construction the underwriters are protected, because it would be a fraud upon them if after the appropriation to one vessel there were an attempt to appropriate the policy to another. It is quite clear that the appropriation, in some shape or other, must be so made as that the ship shall be insured in the interval between the appropriation and the declaration to the defendants. This view is in accordance with the passage cited from Arnould on Marine Insurance, p. 175 (p. 221, 2nd edit.). It is scarcely necessary to add, that Mr. Bovill's contention that the risk did not attach till the declaration reached the defendants is quite untenable; for if the assured had a right, as he admits they had, to make the appro-

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priation to any ship they chose, to say that a loss occurring [\* 36] between \* the appropriation and the declaration reaching the defendants would not be covered, is to deprive the assured of all the advantage of their right.

CROMPTON, J. — I am of the same opinion. I think the real construction of this policy is that it is to follow the former one as one insurance so as to substitute £10,000 for £7000; and the object of the proceedings between the parties is quite clear; the plaintiffs' company wished to cover any excess over £5000 in any one ship from Calcutta to London, so as to secure themselves on the whole voyage. It appears to me that the policy is to be treated as following and keeping up the former open policy, although there were three slips on three specified ships treated in a different way; but I cannot think it was meant that the short interval between the other risks being appropriated and the fresh policy actually effected was to be left uncovered. Then comes the question, When did the risk on this policy attach? I do not agree with Mr. Lush's first contention, that the effect of the course of dealing and form of policies was that the risk attached in order of the sailing of the ships insured by the plaintiffs' company. But I feel inclined to think that his other proposition is true, that the risk attached as soon as the excess of insurance on the ship *Red Gauntlet* was appropriated to the defendants' policy by the agent in Calcutta. The risk of the plaintiffs would attach on the loading, and in all probability, I think, the defendants' risk does attach immediately on the appropriation made abroad; but, at all events, I have no doubt that the appropriation made by letter from the agent at Calcutta, and acted on by the plaintiffs in London, by forthwith communicating it to the defendants, was a declaration of the risk in good time. According to the contention of Mr. Bovill, the whole voyage could never be covered. I think the appropriation would be binding in the first instance; at any rate, it would be by the declaration delivered in London. It seems to be clearly sufficient if a declaration is made at once in London according to the instructions received from abroad, and I adopt Lord ELLENBOROUGH's view (in *Robinson v. Touray*) that the power of naming or declaring the ship on which the policy is to attach is a power given to the assured, and that they may exercise this power at any time, as long as they can do it innocently and without fraud. Here the appropriation was made perfectly bona

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*fide* in Calcutta, and was carried out by the plaintiffs in London I think Mr. Arnould's statement is quite correct, and it agrees with my view of the law.

MELLOR, J.—The question is, What was the nature of the contract between the plaintiffs and the defendants, as deduced from the documents themselves and the course of dealing between the parties, with reference to which the policies were effected? And it is quite clear that the intention was, that while the defendants were to be protected by a declaration, the plaintiffs' company should always be secured, against any excess over £5000 on goods on any one ship, as soon as they had contracted this liability. I also agree that the knowledge of the loss of the ship was not a knowledge of loss in any sense that could vitiate the policy. I entirely agree with what has already been said, and will not repeat it.

SHEE, J.—The defendants have undertaken to insure the excess of risk above £5000 on any insurance that may be taken by the plaintiffs' company on goods in any one ship from Calcutta to London, to be shipped on or before the 30th of December, 1860, on ships of a certain class and to be declared. The *Red Gauntlet*, on which goods had been insured by the plaintiffs' company for an excess above £5000, was one such ship; so that according to the plain meaning of the words the risk would come within the meaning of the contract. Now, when this particular policy was effected, it was known to both parties that the *Red Gauntlet* had been lost, but it was not known to either that she was one of the ships on which any risk at all, much less in excess of £5000, had been taken by the plaintiff's company; and in order to vitiate the policy there must at all events be a knowledge that the particular risk insured was lost. Then the ships are “to be declared;” that can hardly mean that the underwriters have an option to refuse when the declaration is made, for they undertake to insure any excess on any ship \* of a particular class sailing before a particular [\* 37] time; and the engagement to declare can only mean that as soon as an excess over £5000 has been taken by the plaintiffs' company, they will declare the name of the ship to which they apply the defendants' open policy, and the policy must attach as soon as the risk taken is so declared. And I do not think the defendants could get rid of their liability, even if it had been known that that risk had been lost at the time the policy was effected.

*Judgment for the plaintiffs.*

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Nos. 71, 72.—*Harman v. Kingston*; *Gledstones v. Royal Ex. Assur. Corp.*—Notes.

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#### ENGLISH NOTES.

The case of *Heuchman v. Offley* (1794), 2 H. Bl. 345 n., 3 R. R. 413, referred to in the argument of *Harman v. Kingston*, arose out of two insurances for £4000 and £6000 respectively made pursuant to advices from India, on goods on board any ship or ships which should sail between certain dates. Goods to the value of £4889 were loaded on board one ship, and to the value of £4500 on another ship, both sailing within the time limited. The former ship was lost, and the latter arrived safe. Lord MANSFIELD at the trial, and the Court subsequently, held that the insured was entitled to apply the £6000 policy to the goods on board the lost ship, and to recover the whole loss accordingly out of the £6000.

#### AMERICAN NOTES.

The *Harman* case is cited by Parsons, *Marine Insurance*, p. 284, and the *Gledstones* case is largely quoted from at p. 331, as one that "has attracted much attention," and will be found interesting and instructive, as carrying the doctrine "further than any other case," and as of "convincing weight."

In *E. Carver Co. v. Manuf. Ins. Co.*, 6 Gray (Mass.), 214, where the policy provided that "all sums placed at risk under this policy are to be indorsed thereon," the insured may make such indorsement after loss, if he was not negligent and acted in good faith. Citing the *Harman* case. But in *Edwards v. St. Louis Per. Ins. Co.*, 7 Missouri, 382, where the provision was, "indorsements on this policy to be the evidence of property at the risk of the company under the same," indorsement before loss was held essential, distinguishing the *Harman* case on the ground of the different phraseology, "as might be thereafter declared and valued," and relying on *Worseley v. Wood*, 6 T. R. 711.

An analogous case is *Hartshorne v. Union M. Ins. Co.*, 36 New York, 172, where it was held that a custom, by which an account was kept of shipments of cotton by a merchant in Appalachicola on account of specified correspondents, which were entered in a book kept by such merchant and reported to the insurer's agent monthly, when the premiums for the preceding month were paid, was conclusive on the insurer, although the risk was in fact terminated before it came to the knowledge of the merchant or the agent.

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## SECTION VI.—*Construction.*

### (5) SUING AND LABOURING CLAUSES.

No. 73.—KIDSTON v. EMPIRE MARINE INSURANCE COMPANY.

(C. P. 1866. EX. CH. 1867.)

#### RULE.

UNDER the “suing and labouring” clause of a policy in the usual form, the insured may recover expenses in the nature of salvage, although he is debarred from claiming the principal loss by reason of a warranty against particular average.

#### Kidston and others v. Empire Marine Insurance Company.

L. R. 1 C. P. 535-552; 2 C. P. 357-368 (s. c. 36 L. J. C. P. 156; 16 L. T. 119; 15 W. R. 769).

#### *Insurance.—Suing and Labouring Clause.—Salvage Services.*

The ship *Sebastopol*, of which the plaintiffs were owners, was chartered [535] for a voyage from the Chineha Islands to the United Kingdom with a cargo of guano, at a freight payable on arrival at the port of discharge. The plaintiffs effected with the defendants a policy on the charter freight, which contained the usual suing and labouring clause and the following warranty, — “warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt.” In the course of the voyage the vessel encountered a severe storm, and put into Rio, so damaged by perils of the sea as to be not worth repairing, and she was accordingly sold. The plaintiffs gave no notice of abandonment, but the guano having been landed and warehoused at Rio, the master procured another vessel, the *Caprice*, to carry it on to Bristol, for an agreed freight of £2467 11s. 10d., which the plaintiffs paid, receiving from the owners of the cargo the full charter freight. The master also incurred an expense of about £100 in landing, warehousing, and reloading the guano at Rio.

*Held*, that the plaintiffs were entitled to recover from the defendants, under the suing and labouring clause, the expenses so incurred and the freight of the *Caprice*, notwithstanding there had been no abandonment.

*Held*, also, that evidence was admissible to show that, by the usage amongst underwriters, the term “particular average” does not include expenses which are necessarily incurred in order to save the subject-matter of insurance from a loss for which the insurers would have been liable, and [536] that these are usually allowed under the name of “particular charges.”

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*Held*, also, that, the occasion upon which these particular charges were incurred being such as to be within the suing and labouring clause, the application of that clause was not excluded by the warranty against particular average.

This was an action to recover £1145 3s. 6d. upon a policy of insurance effected in the sum of £2000 by the plaintiffs, with the Empire Marine Insurance Company, on charter freight, valued at £5000.

The declaration contained a count on the policy, and the common money counts. The only material claims in the declaration were: first, a claim of the £2000 insured, on the ground of the total loss of the charter freight; secondly, a claim, under the suing and labouring clause of the policy, for the charges and expenses incurred by the plaintiffs by reason of the plaintiff's, their factors, servants, and assigns, suing, labouring, and travelling in and about the defence, safeguard, and recovery of the subject-matter of the insurance; thirdly, a claim for money paid to the defendants' use.

The defendants pleaded to the first claim that the ship was not stranded, sunk, or burnt, and that the loss was a particular average loss; to the second claim: first, that the charges and expenses so incurred as aforesaid constituted and were only particular average losses, from which the subject-matter of the insurance was warranted free; secondly, that a loss or misfortune did not arise within the true intent and meaning of the policy; thirdly, that there was no suing, labouring, or travelling in and about the defence, safeguard, and recovery of the subject-matter of the insurance, within the true intent and meaning of the policy. To the common counts, never indebted.

The plaintiffs joined issue on the several pleas, and also demurred to the plea which set up that the charges were particular average losses.

The cause was tried before ERLE, Ch. J., at the London sittings after Michaelmas Term last, when it appeared that the plaintiffs, shipowners at Glasgow, were owners of the ship *Sebastopol*; and the defendants were an insurance company carrying on business at Liverpool.

[\* 537] \* On the 16th of March, 1863, the plaintiff's chartered the *Sebastopol* to Messrs. Thomson & Co., by a charter-party, according to the provisions of which the ship was to proceed

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to the Chincha Islands, there to load a cargo of guano, and thence to proceed therewith to the United Kingdom, for the stipulated freight of 75s. sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam; such freight to be paid as follows: viz., £1000 in cash on arrival at port of discharge, three months' interest at the rate of 5 per cent being deducted, and the balance forty-eight hours after the true and right delivery of the whole cargo.

On the 18th of August, 1863, the plaintiffs effected with the defendants the policy in question, being a policy of insurance in the sum of £2000, by the *Sebastopol*, on charter freight valued at £5000, warranted free from particular average, also from jettison, unless the ship were stranded, sunk, or burnt; the voyage insured by the said policy covering the aforesaid chartered voyage to the Chincha Islands and thence to the United Kingdom. The policy also contained the usual suing and labouring clause.

The *Sebastopol* sailed for the Chincha Islands, and there loaded a cargo of guano, with which she sailed for Cork; but, in the course of the voyage, she was compelled by stress of weather to put into Rio Janeiro, where she arrived on the 7th of February, 1864.

On her arrival at Rio, the cargo of guano was discharged and properly stored and warehoused; and on being surveyed, she was found to have been so damaged by the perils of the seas as not to be worth repairing. She was therefore sold by the master at Rio on the 31st of March, 1864; the sale being in all respects proper and necessary, and the ship herself being then a total loss.

On the 12th of March, 1864, the master of the *Sebastopol* chartered the ship *Caprice*, at a freight of 37s. 6d. per ton, for the purpose of bringing the cargo of guano from Rio to the United Kingdom, and delivering it to its owners. The charter-party was made at Rio, and purported to be made between E. S. Harkey, master of the *Caprice*, and Duncan Taylor (on behalf of owners), master of the *Sebastopol*, and was signed E. S. Harkey and Duncan \* Taylor. The cargo was accordingly taken from [\* 538] the warehouses where it had been stored and warehoused at Rio, and loaded on board the *Caprice*, and conveyed by that ship to Bristol, and there duly delivered to Messrs. Thomson & Co., the owners of the cargo. The plaintiffs paid to the owners of the *Caprice* £2467 11s. 10d., which was the agreed freight payable to that vessel for carrying the cargo from Rio to Bristol.

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Messrs. Thomson & Co., on delivery of the cargo, paid the charter freight of £5000 in full to the plaintiffs, who did not pay the same or any part thereof to the defendants.

The plaintiffs did not give any notice of abandonment to the defendants.

The expenses incurred at Rio in discharging, warehousing, and transshipping the goods, together with the freight payable to the *Caprice*, amounted to about £3000.

For the plaintiffs it was contended that they were entitled to recover from the underwriters the expenses incurred in conveying the guano to the *Caprice* from the warehouses at Rio, which were less than £100, and also the sum of £2467 11s. 10*d.*, paid by the plaintiffs to the owners of the *Caprice* for carrying the cargo from Rio to the United Kingdom.

For the defendants it was contended that they were not liable on the policy to repay to the plaintiffs any part of the said expenses, nor any part of the £2467 11s. 10*d.*

At the trial several average-adjusters and other witnesses were called to prove the meaning of the term "particular average" in the business of marine insurance; and the jury found that, up to the time of the policy in question, there had been in the business of marine insurance a well-known and definite meaning affixed by long usage between the assured and the underwriter to the term "particular average," as contradistinguished from the term "particular charges," in the manner described by the witnesses, viz. that "particular average" denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not "particular average," but are termed "particular charges."

[\*539] Upon this finding of the jury a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit.

Mellish, Q. C., in Hilary Term last, obtained a rule pursuant to the leave reserved, on the grounds, first, that the charges in question were not within the clause in the policy respecting suing and labouring, and that no other part of the policy was applicable to the case; secondly, that the custom alleged was a universal custom, and not a custom of any particular place or trade;

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thirdly, that there was no evidence that the alleged custom prevailed in Liverpool at the time the policy was made.

E. James, Q. C., and Sir G. Honyman, showed cause, and contended that the plaintiffs were entitled to recover on three grounds: first, that the loss was not a particular average loss, but a total loss with benefit of salvage; secondly, that they were entitled to recover under the suing and labouring clause, without interfering with the rule laid down in *The Great Indian Peninsular Railway Company v. Saunders*, 1 B. & S. 41, 30 L. J. Q. B. 218; in error, 2 B. & S. 266, 31 L. J. Q. B. 206; and *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99, the money having been paid in order to avert a loss which would otherwise have fallen upon the underwriters; thirdly, that the evidence of usage was legitimately introduced for the purpose of showing that "particular average" has a well-known definite meaning as contradistinguished from "particular charges." They cited the following authorities: *Stewart v. Steele*, 5 Scott N. R. 927; *Mount v. Harrism*, 4 Bing. 388 (29 R. R. 580); *Furnworth v. Hyde*, 18 C. B. (N. S.) 835, 34 L. J. C. P. 297; *Shipton v. Thornton*, 9 A. & E. 314; *De Cunha v. Swann*, 16 C. B. (N. S.) 772; *Vlierboom v. Chapman*, 13 M. & W. 230; *Clayton v. Gregson*, 5 A. & E. 302; *Gorrisson v. Perrin*, 2 C. B. (N. S.) 681, 27 L. J. C. P. 29; Phillips on Insurance, vol. ii. s. 1743; Arnould on Insurance, 3rd ed. by Maelachlan, vol. ii. p. 739, n.; and Taylor on Evidence, 4th ed., ss. 1059, 1060, 1062, 1063.

Mellish, Q. C., and Cohen, in support of the rule, contended that \* there was no total loss of the freight, either [\* 540] actual or constructive, the goods being capable of being carried to their destination and earning freight; that upon this form of policy the suing and labouring clause has no application unless there has been an abandonment and the expenses have been incurred in order to avert a total loss; that the loss here being partial, the expenses incurred constituted "particular average" only, and therefore were within the warranty; and that no usage could be set up which contradicted the written policy. They cited *Michael v. Gillespy*, 2 C. B. (N. S.) 627, 26 L. J. C. P. 306; *Philpott v. Swann*, 11 C. B. (N. S.) 270, 30 L. J. C. P. 358; *Hull v. Janson* 4 E. & B. 500, 24 L. J. Q. B. 97; *The Great Indian Peninsular Railway Company v. Saunders*, 1 B. & S. 41, 30 L. J. Q. B. 218; in error, 2 B. & S. 266, 31 L. J. Q. B. 206; *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99; Emerigon, *Traité des Assurances*, ch.

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12, s. 39; ch. 17, s. 7; Benecke's Principles of Indemnity, pp. 165, 166; Code de Commerce, Liv. ii. tit. 11, art. 403; Arnould on Insurance, 3rd ed. by MacLachlan, vol. ii. p. 824; Phillips on Insurance, ss. 1422, 1632.

*Cur. adv. vult.<sup>1</sup>*

The judgment of the Court (ERLE, Ch. J., WILLES, KEATING, and MONTAGUE SMITH, JJ.) was delivered by

WILLES, J.—This was an action upon a policy of insurance for £2000 from South America to the United Kingdom. The vessel procured a charter from the Chincha Islands to the United Kingdom, loaded a cargo of guano there, and on going round Cape Horn suffered damage so serious that she had to put into Rio, where she was abandoned, and, it must be taken for the purposes of this case, was totally lost. The cargo, however, was transshipped into another vessel and sent home, and the chartered freight, or an amount equivalent to the chartered freight, according to the construction to be put on the matter, exceeded the expense of transshipment,

and the freight from Rio to Liverpool was received by the  
[\*541] assured. \*The action was brought by the assured to recover the expenses of transshipment and forwarding.

At the trial, evidence was given to show that the warranty in the policy on which the question turned was not considered applicable to the circumstances. The warranty was “free from particular average; also from jettison, unless the ship be stranded, sunk, or burnt,” neither of which happened.

The evidence given was for the purpose of showing that the charges of transshipping and forwarding had been considered to be what was called technically “particular charges,” and not particular average so as to be within the warranty. The verdict passed for the plaintiffs, affirming the existence of the usage at the time when the policy was made, subject to leave reserved to the defendants to move to enter a verdict, which they accordingly did; and that rule was discussed last term before the CHIEF JUSTICE and my Brothers KEATING, MONTAGUE SMITH, and myself, when we took time to consider. At the sittings after term we discharged the rule, not stating our reasons, but promising to do so during this term; and that promise I am now about to fulfil.

Many points were made upon the argument of this rule; upon one of which only is it necessary to pronounce an opinion. That

<sup>1</sup> The argument of the demurrer was by arrangement taken with the rule.

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turned upon the construction of the suing and labouring clause in the policy; and it may be considered under the following heads: first, whether the expenses incurred were of a character to be within the clause; secondly, whether the occasion upon which they were incurred was such as to be within it; thirdly, whether, if it was such, the application of the clause is excluded by the warranty against particular average.

As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. Without incurring them, the subject-matter of the insurance never would have had any complete existence. They were incurred in order to earn it; and they represented so much labour beyond and besides the ordinary labour of the voyage, rendered necessary for the salvation of the subject-matter of insurance, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was \* bestowed. As the goods lay at Rio, no part of the [\* 542] chartered freight had accrued due, and no freight even *pro rata' itineris* could have been claimed by the shipowner. His only right in respect of the charter freight was to detain the goods for a reasonable time in order to send them on in another vessel to their destination, and there claim an amount equal to that of the charter freight. In order to do so, labour must be used and expense incurred. It can make no difference whether the shipowner happen to have at the port of distress a vessel of his own which he can employ in this service, in which case the labour of forwarding would be strictly that of himself or his servants, or whether he forwards in the vessel of another shipowner, paying for his labour and that of his servants. Nor can it make any difference, in the application of the clause, whether, as here, the goods are in a port of large resort, or where by reason of the rate of freight a forwarding vessel is easily procured, or whether the vessel becomes a wreck in an out-of-the-way place, and by unusual enterprise and skill the master is enabled to communicate with a vessel either of his owner or of some other person by which he forwards the cargo to its destination. The amount of labour is different in degree in the two cases; but in each it is a consequence of a peril insured against: it is incurred in preventing the destruction or nonentity of the subject-matter for which in the event of its loss the underwriters must be

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answerable. There is in each case a loss or misfortune threatening the safety of the subject-matter of the insurance, and by the operation of which, unless averted by labour, that subject-matter will be imperilled and the underwriters may become liable.

As to the second head,—whether the occasion upon which the expenses were incurred was such as to be within the suing and labouring clause,—this depends upon the true answer to the question so thoroughly discussed in the course of the argument; viz., whether the clause ought to be limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes, or may become, theirs; or whether it extends to every case in which the subject of insurance [\* 543] is exposed \* to loss or damage for the consequences of which the underwriters would be answerable, and in warding off which labour is expended. In the former construction the clause is inapplicable to the present case; in the latter it is applicable, and the assured is entitled to contribution.

The question manifestly depends upon the construction of the language of the clause; and, quite apart from the proved usage, we think the latter is the true construction. The words of the ordinary suing and labouring clause (to which in this policy is superadded an express provision as to abandonment, upon which we need only say in passing that it does not alter the question in favour of the underwriters) are used in the same form as must have been in common use before 1783, when Emerigon published his great work on insurance, in which, amongst the various forms of the clause used at different ports, that of the London policy then used is given. Emerigon, by Boulay-Paty, vol. ii. p. 239. The words are quite general, and ought to be so construed unless some good reason is given for restraining them,—that, “in case of any loss or misfortune, it shall be lawful” to “sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the subject-matter,” “without prejudice to this insurance” (not abandonment, as in the French Ordonnance hereafter cited), “the charges whereof the said company will bear,” “in proportion to the sum hereby insured” (not the amount saved, as in the French Ordonnance). Up to this point, there is not a word about abandonment; and this is the whole of the usual clause. The mean-

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ing is obvious, that if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5 per cent, and the goods are wetted in a storm which \* drives the ship into a port of distress, where [\*544] by drying at an expense less than 5 per cent the goods might be saved or damaged under 5 per cent, whilst, if not dried, they would decay and become damaged over 5 per cent, though existing in specie, so that freight would be payable. In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject-matter to which they relate, therefore, point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not.

There remains to be considered, thirdly, whether the application of the suing and labouring clause is excluded in this particular case by the warranty against particular average, — “warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt.” And this depends upon whether the expression “particular average” in this context, and construed, according to the golden rule, by what goes before and follows in the policy, includes expenses which fall within the suing and labouring clause, so that in effect the suing and labouring clause is expunged by the warranty.

This is a question the answer to which involves most important consequences, because, if the warranty against particular average, or, to use a more accurate expression with the same meaning, the warranty against total loss only, excludes the operation of the

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suing and labouring clause even where an impending total loss is averted by extraordinary exertion and expense, it must be because the word "average" has some fixed and definite meaning so rigid and inelastic that it cannot be modified or limited so as to apply to loss of or damage to the thing insured (the sense in which it has been hitherto understood by average-staters); but that it must needs also include contribution to any labour incurred in the defence and safeguard of the thing insured, so that even an express clause left standing in the policy with reference to such labour

(the suing and labouring clause) must be rejected as inconsistent [\* 545] with the warranty. If this be so, it must equally

be true of all memorandum goods which are warranted free from average under a certain percentage; and the operation of this would be so general, if not universal, that the suing and labouring clause would be confined to the cases excepted in the memorandum alone. Two results would follow, both novel in practice, and one at least very remarkable.

The first would be unfavourable to the underwriters in a novel way, because the memorandum was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear. The exception of stranding tends to show that this was the scope of the memorandum; for it is the exception of such a loss as makes it probable that the deterioration of the goods, though under the given percentage, was nevertheless not to be attributed to the perishable nature of the goods themselves. Accordingly, the rule has been to pay for damage to memorandum articles only where it exceeded the specified percentage, and not to allow this percentage to be eked out by expenses falling within the suing and labouring clause. Thus, in the case already put, of goods wetted by a storm, the amount of expenses reasonably incurred in preserving the goods is, according to the present practice, contributed to under the suing and labouring clause, however small in the result be the loss or damage to the goods; and the loss of or damage to the goods is paid if it amount to the stipulated percentage, but not otherwise; and the amount of expenses is not added in order to make up that percentage. Thus, if the agreed percentage be 5 per cent, and the expenses amount to 2 per cent, and the loss or damage to 3 per cent, only the expenses are paid, and not the average. But if we hold that the warranty excludes

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the application of the suing and labouring clause, the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate.

Upon the other hand, if the expenses should be less than the percentage, and a loss is thereby prevented either altogether or to an extent less than the percentage, as if, in the case put, the expenses were 3 per cent and the damage only 1 per cent, according to the present practice the underwriters would pay the expenses; \* but if we decide for the present defendants, the [\* 546] underwriters, though saved from loss, would be altogether exempt from contribution.

In our view, however, we are not compelled to adopt so inconvenient and unpractical a conclusion. The word "average," so far from being a term of art (except in so far as according to the evidence usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification necessarily including expenses in the defence or safeguard of the subject-matter insured, is a word used in a great variety of phrases as applicable to different subjects-matter, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied; and we need not do more than refer to the instances cited in argument, and more especially to the very learned note of Mr. MacLachlan in Arnould on Insurance (3rd ed., vol. ii. p. 739). Amongst the various uses to which the word has been applied, no doubt, that of "small expenses" is one, as in the usual clause in a charter-party. So, in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back except at an expense equal to its value when recovered.

The question here, however, is not as to the extension of which the term "average" is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and if possible read so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and labouring clause, which for the reasons already given specially provides for this case, has been allowed to remain a part of the policy; and that a special provision as to a particular subject-matter is to be preferred to general language, which might

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have governed in the absence of such special provision. *Generalia specialibus non derogant. Specialia generalibus derogant.*

In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions, is, that the warranty against particular average, does no more than limit

the insurance to total loss of the freight by the perils in-  
[\* 547] sued \* against, without reference to extraordinary labour

or expense which may be incurred by the assured in pre-  
serving the freight from loss, or rather from never becoming due,  
by reason of the operation of perils insured against; and that the  
latter expenses are specially provided for by the suing and labouring  
clause, and may be recovered thereunder.

Much reliance was placed, for the defendants, upon two recent decisions which are said to have determined that there could be no liability under the suing and labouring clause where there was none under the policy: *The Great Indian Peninsular Railway Company v. Saunders*, 1 B. & S. 41, 30 L. J. Q. B. 218; in error, 2 B. & S. 266, 31 L. J. Q. B. 203; and *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99,—the first of which cases was decided before and the other after the date of the present policy.

Before these decisions, the liability of the underwriters appears to have been universally admitted and acted upon even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded.

Probably the underwriters, up to the time of the first of these decisions, thought it so important to encourage honest efforts to preserve and forward the cargo, or otherwise to preserve the subject-matter of insurance, that they preferred paying in all unsuspicious cases, without nice inquiries as to whether the expenses had in the particular instance averted liability. In so doing, they not only acted with liberality, but no doubt also best studied their own interests; and, whilst they calculated the premium so as to include a remuneration for the extra liability which they were satisfied to bear, they probably at the same time found that the encouragement to fair dealing thereby afforded was their best security against the more serious losses that might arise from neglect of precautions of which the expense was thrown upon the assured.

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This practice, however, could not prevail to alter or enlarge the application of the suing and labouring clause; because, though usage may impose a meaning upon a word such as "average," it \*cannot alter the rules of construction: and, in the cases [\*548] referred to, the decision and the sole decision was, that freight and other expenses of forwarding from a port of distress to the port of destination goods warranted free of particular average, under circumstances under which the underwriters could not have been liable if the expenses were not incurred, was not within the true intent and meaning of the suing and labouring clause, which in the context of a policy of insurance could only extend to suing and labouring by means of which the underwriters might obtain a benefit.

In *The Great Indian Peninsular Railway Company v. Saunders* the goods were iron rails for Bombay, shipped to be paid for lost or not lost. They were insured with a warranty "free of particular average unless the ship should be stranded, sunk, or burnt." The vessel on her way put into Plymouth, where she was a total loss; but she was not "stranded, sunk, or burnt." The rails were saved and sent on by other vessels, and for the freight paid upon such forwarding the underwriters were held not to be liable: and BLACKBURN, J., in delivering the judgment of the Court, carefully abstained from deciding the question now before us; for, he said (1 B. & S. 53, 30 L. J. Q. B. 222), "It is not necessary to decide whether an underwriter on a policy against total loss only, is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance (3rd ed. vol. ii. p. 464, s. 1777); and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to \**Rosetto v. Gurney*, 11 C. B. 176, 20 L. J. C. P. 257, [\*549] unless the amount of the extra freight exceeded the value

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of the goods when forwarded, which is not the case here: and an actual total loss is out of the question." That judgment was affirmed in the Exchequer Chamber, where ERLE, Ch. J., in like manner, delivering the judgment of the Court, said (2 B. & S. 273): "The expenses that can be recovered under the suing, labouring, and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety; and the question is, Were those expenses incurred to prevent a total loss? Had the owners a right, when the goods were given into their possession, to turn the transaction into a total loss? Certainly not; for they had their goods in specie, and consequently that £825 11s. 7d. had no reference to suing, labouring, or travelling to prevent such a loss."

That case was followed by *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99, in which bacon was insured upon a voyage from Liverpool to New York, "free from average unless general or the ship were stranded, sunk, or burnt." The vessel on her way, by perils of the sea, but without being stranded, sunk, or burnt, became disabled, and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie, and was not totally lost, constructively or otherwise. No expenses appear to have been incurred in saving the goods from a total loss, which was negatived; but certain expenses were incurred in the way of extra freight, transshipment, warehousing, surveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances, under the name of particular charges. The judgment was for the underwriters, upon the ground stated by ERLE, Ch. J., viz., that "what the master did was in discharge of his duty in ordinary course, and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage

in question." No notice appears to have been taken of the  
[\* 550] practice \* of underwriters, probably for the reason already mentioned, that, although usage may give to the words "average," "particular average," or "average unless general," a conventional meaning, so as to make them include partial loss or damage of the subject-matter only, and not what are known as "particular charges," which fall within the suing and labouring

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clause, yet such usage could not control the construction of the policy, by which that clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion. That is the circumstance which distinguishes these cases from the present,—that the usage of underwriters already brought to the attention of the Court in *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99, could not affect the decision in that case. These decisions, therefore, are inapplicable to the present case, and, when examined, prove to be anything but authority for the defendants.

Passages from Emerigon were cited by the defendants' counsel, and much relied upon, in which a contrary opinion is supposed to have been expressed to that upon which we found our judgment. In chapter 12, s. 41, vol. i. p. 600, Boulay-Paty's edition, treating of general and particular average as between the owner of ship, freight, and goods, he says: "Les frais faits pour sauver la marchandise sont avaries simples pour le compte des propriétaires." He is not there giving an opinion upon the construction of the policy. He refers, however, to the 17th chapter, s. 7, for a discussion of the question of liability as between the insurers and the assured, either with or without a suing and labouring clause; and in that, which is the part of the work applicable to the present subject, he throughout treats the question as depending upon the very words of the suing and labouring clause.

Nothing can make this more clear than a reference to his treatment of the question: "Si les frais de sauvetage excédent la valeur des effets sauvés, cet excédant est-il à la charge des assureurs?" To which he answers: "Suivant les clauses insérées dans les formules de diverses places de commerce, les assureurs, indépendamment des sommes par eux assurées, sont tenus de payer l'excédant des frais de sauvetage." Vol. ii. p. 238. He then sets out the forms of the suing \* and labouring clauses used at Antwerp, [\* 551] Rouen, Nantes, and Bordeaux; and he refers to a similar and more ancient one to be found in Loccenius, p. 981, by which the underwriters undertake for expenses incurred in the safeguard of the goods, even though no benefit should follow; and he remarks thereupon,— "Par ces formules les pouvoirs les plus libres sont donnés à l'assuré et à ses représentans, afin de les inviter à travailler au sauvetage, sans être arrêtés par la crainte d'en supporter eux-mêmes les frais; mais les assureurs, en souscrivant pareils pactes,

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contractent à l'aveugle un engagement dont les conséquences sont indéfinies."

He then gives the London form of suing and labouring clause as then and still used; and he proceeds to say that the Marseilles policy (with which he was so familiar) contained nothing of the sort, and that an express authority to sue and labour was necessary in order to charge the Marseilles underwriters with the expenses.

This view, so far as it bears upon the present argument, is in accordance with the view of the London average-staters, and favours a distinction between loss and damage to the thing assured, and expenses incurred in its protection, and a separate provision for the latter.

In fact, the key to the French authorities is to be found in the positive law of France upon the subject, by which, in the absence of express contract, contribution on the part of the underwriters was enforced in the cases of the greater perils of shipwreck or stranding, and then only to the value of the property saved for the underwriters. Thus, by the *Ordonnance de la Marine* of 1681, Liv. iii. tit. 6, art. 45,—“*En cas de naufrage ou échouement, l'assuré pourra travailler au recouvrement des effets naufragés, sans préjudice des delaissements qu'il pourra faire en temps et lieu, et du remboursement de ses frais dont il sera cru sur son affirmation jusqu'à concurrence de la valeur des effets recouvrés.*” This is followed closely, though not exactly, by the *Code de Commerce*, art. 381, with the difference that the latter, by using the word *doit* instead of *pourra*, makes such exertions the duty, and not merely the privilege, of the assured.

Read by the light of this text of the *Ordonnance*, the [\* 552] views of \* Emerigon, so far from being opposed to, are in favour of, the construction which we adopt.

Hitherto we have only adverted in passing to the evidence and the finding of the jury upon the understood meaning in the business of marine insurance of the phrase “particular average.” If necessary, we should have been prepared to hold that the evidence established such an understood meaning, according to which “particular average” does not include “particular charges,” and to act upon such usage as equally sacred with the express part of the contract.

It is needless, however, to enlarge upon this part of the case,

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because, upon the facts proved, and the true construction of the policy itself, we have, for the reasons already given, come to the conclusion that there was a danger of the total loss of the freight by reason of the loss of the ship by perils insured against; that the measures taken by the plaintiff to avert that loss, and the expense incurred therein, were taken and incurred for the benefit of the underwriters, in averting a loss for which they would have been liable; and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto. It is satisfactory, however, to think that, in arriving at this conclusion upon the meaning of the contract into which the defendants have entered, we are deciding also in accordance with the approved usage of commerce.

The verdict for the plaintiffs was therefore right, and the rule to enter the verdict for the defendants is discharged.

*Rule discharged.*

The above decision was brought up, on appeal, to the Exchequer Chamber, where, after hearing argument for the defendants (appellants), and on a subsequent day, the judgment of the Court (KELLY, C. B., CHANNELL, B., MELLOR, J., [L. R. 2 C. P. 363] PIGOTT, B., and LUSH, J.), was delivered by

KELLY, C. B.—In this action, which was on a policy upon freight, a question of great importance to the mercantile community has arisen, and has for the first time, at least in this country, received a judicial decision in the Court of Common Pleas, which decision is now under appeal before us, and which we are called upon to affirm or to reverse.

The facts are few and simple. The plaintiff chartered the ship *Sebastopol* from the Chincha Islands to a port in Great Britain, and effected an insurance upon freight for £2000 by the policy in question, the freight being valued at £5000; and the policy contained a warranty against particular average, with the well-known suing and labouring clause, as adopted in English insurances. The ship sailed from the Chincha Islands, and in rounding Cape Horn became so greatly damaged that she afterwards put into the port of Rio, where she became a wreck, and may be deemed to have been totally lost. The cargo of guano was landed and warehoused, and was afterwards shipped on board a vessel called the *Caprice*, chartered by the plaintiff, and was forwarded in safety

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to its destined port in Great Britain, at an expense for freight of £2467 11s. 10d.

Under these circumstances the plaintiffs brought this action, with a count claiming for a total loss of freight, and another count for £1145 3s. 6d. under the suing and labouring clause, for the charges and expenses of conveying the cargo from Rio to this country. It was contended for the plaintiffs that when the ship had become a wreck, and the cargo had been landed at Rio, when

[\* 364] \* *itineris* that no freight could be claimed by the law of England *pro ratâ* that a total loss of freight had been incurred;

and that inasmuch as the proportion of the homeward freight by the *Caprice* being a charge incurred in preserving the subject-matter of the insurance, and so relieving the defendants, the underwriters, from their liability as for a total loss of freight, it was a charge within the suing and labouring clause, which the plaintiffs were entitled to recover. On the other hand it was insisted for the defendants that, inasmuch as the plaintiffs were able to forward the goods to England by another vessel, at an amount of freight substantially less than the entire freight, as valued under the policy, a partial loss only, and not a total loss, of freight had been incurred, which the warranty against particular average precluded the plaintiffs from recovering. It was argued that the master was bound, under the circumstances that had occurred, to forward the goods to England; that his ability to do so, and so to earn the whole of the freight, subject to a deduction of the cost of the conveyance from Rio to this country, made the case one of partial and not of total loss, and so within the particular average clause. We are of opinion, however, that upon the ship *Sebastopol* becoming a wreck at Rio, and the goods having been landed there, inasmuch as no freight *pro ratâ itineris* could be claimed, a total loss of freight had arisen, and that expenses incurred in forwarding the goods to England by another ship were charges within the suing and labouring clause, incurred for the benefit of the underwriters to protect them against a claim for total loss of freight, to which they would have been liable but for the incurring of these charges, and that consequently the amount is recoverable under that clause in the policy.

The question raised by the defendants, whether the owner was bound, under these circumstances, to forward the goods to England, is attended with some difficulty and uncertainty. It has been

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much considered, and in effect decided, in America. Parsons, on Maritime Law, vol. ii. p. 385, lays it down "that there is a total loss of freight when the ship and cargo are totally lost, or the vessel becomes wholly unnavigable, or is subject to a detention of such a character as to break up the voyage. It is said, in some cases, that if the loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight," \* and claim as for the total loss of it; but if, [\* 365] although the ship itself be wrecked and utterly lost, the master can reship and forward the goods by reasonable endeavours and at reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to its amount when so adjusted."

It appears in a note that in a case reported, 9 Johnson, 17, where the vessel was lost at an intermediate port, but the goods remained and were seized by the government, the underwriters were exempt from loss by seizure in port. It was held that if the goods could have been sent on but for the seizure, the defendants were not liable. KENT, Ch. J., said: "The point is, whether it be a good defence in any case to an action on a policy for freight, that the shipowner refused or neglected to forward the goods by another vessel when he had it in his power. We have not met with any decided case on this point, but it appears to be reasonable and consistent with the principles of the contract that the insurers should in such case be discharged."

This has never been held to be law in this country, but it must be admitted that it is not unreasonable that if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer. But it is unnecessary to decide this point; for whether or not a shipowner or charterer be under a legal obligation to forward the cargo by another ship to its destined port he is at all events at liberty to do so, and thus to earn his entire freight; and we think that, under a policy like this, he is entitled to claim the cost which he so incurs under the suing and labouring clause, where such a clause is to be found in the policy, on the ground that he has thereby preserved the subject-matter of the insurance from total loss, to which it would otherwise have been liable upon the policy. It should seem, too,

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that the rule of law which in this country entitles the shipowner to recover these charges under an insurance like this against the underwriters is in strict accordance with sound policy. For if the master knows, where the ship has been lost and the cargo may be sent forward to its destined port, that his owner [\*366] will be indemnified \* in respect of the cost which he may incur in so forwarding the goods, he will have every inducement to save the property and complete his contract with the owner of the cargo; whereas, if the cost of the conveyance of the goods for the rest of the voyage is to fall upon his owner without recourse to the underwriters, he will be exposed to the temptation of evading the performance of what may at least be termed a moral duty, and may leave the cargo to its fate in the foreign port in which it may have been unshipped.

We are of opinion, therefore, that whether it be the duty or not of the master, under circumstances like these, to forward the cargo in another ship to its destined port, that upon the facts of this case there was a total loss of the freight when the ship had become a wreck, and the goods had been landed at Rio; and that the cost incurred by the master in shipping the goods by the *Caprice*, and causing them to be conveyed to this country, is a charge within the express terms of the suing and labouring clause, and that the amount, or the due proportion of it, is recoverable under that clause against the underwriters.

The cases of *Great Indian Peninsula Railway Company v. Saunders*, 1 B. & S. 41, 30 L. J. Q. B. 218; in error, 2 B. & S. 266, 31 L. J. Q. B. 206, and of *Booth v. Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99, have been pressed upon the attention of the Court, as showing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriters by reason of the warranty against particular average. But these were cases of insurance upon goods, to which the *pro rata* doctrine has no application, and where, the whole or a great portion of the goods still existing in specie, it was impossible to hold that a total loss had arisen. And Mr. Justice BLACKBURN appears to have marked the distinction between the case of goods and that of freight, and forbore to intimate any opinion upon the point which we have now to determine.

But another case from the United States has been cited under the high authority of STORY, and where it is supposed to have

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been held that, under circumstances like these, there was a partial and not a total loss of freight, and that the underwriters were not liable upon the policy; but this case of *Jordan v. Warren Insurance \* Company*, 1 Story R. 342, has really no application to the case before us. There the insurance was on freight from New Orleans to Havre; the ship was run aground and injured before it left the Mississippi, but returned to New Orleans, and after unshipping the cargo was completely repaired and reinstated, and might have taken the cargo on board again and completed the voyage to Havre; but the cargo, having been much damaged, was sold at New Orleans, under an arrangement between the parties, and the ship proceeded on another voyage, not to Havre, but to England. Under these circumstances the shipowner, who claimed as upon a total loss of freight, was held entitled to recover only upon a partial loss, that is to say, for the loss of freight upon some part of the cargo which had been destroyed before it was relanded at New Orleans, and which therefore could never have earned freight at all by the completion of the voyage. No question was raised there concerning particular average, or the suing and labouring clause in a pol<sup>y</sup>. The case, therefore, has no bearing upon the present; but it may be remarked that, where any claim to freight at all was treated as recoverable, it seemed to be upon the footing of a total loss reduced to a smaller amount by expenses incurred for the benefit of the underwriters, and spoken of as salvage.

It remains only to observe upon the evidence given in this case that expenses incurred in preserving the subject-matter of insurance were designated as particular charges, and not as particular average. We think that this evidence in no wise controls or varies the language of the policy, and that it is admissible to show the mode in which expenses of this nature are treated by mercantile men. But this evidence, or the usage which it proves, is in affirmation of the common law of England, which of itself defines the nature and character of these charges, and if rejected and struck out of the case would leave the question in the cause as it was before.

We think, therefore, on the whole, and upon the true construction of the policy, that on the destruction of the ship and the landing of the cargo at Rio there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by

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[\* 368] \*another ship to Great Britain; that the forwarding the cargo by the *Caprice* was a particular charge within the true meaning of the suing and labouring clause, and not the conversion of total loss into a partial loss, which brought the case within the warranty against particular average; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, and incurred for the benefit of the underwriters to preserve the subject of the insurance, and to prevent a total loss, is recoverable under the policy in this action.

The judgment of the Common Pleas must therefore be affirmed.  
*Judgment affirmed.*

## ENGLISH NOTES.

The principle of the decision in this case was followed, and perhaps extended, in that it was applied to the expenses incurred for salvage services in the proper sense of the word, by the Court of Appeal in *Lohre v. Aitchison* (1878), 3 Q. B. D. 558, 47 L. J. Q. B. 534. But that judgment was reversed by the House of Lords (*s. n. Aitchison v. Lohre*, No. 89, p. 449, *post*), under the advice of Lord BLACKBURN in an elaborate judgment, the effect of which was echoed by the LORD CHANCELLOR (Earl CAIRNS) and Lord HATHERLEY.

This judgment of the House of Lords is doubtless binding on all inferior Courts in England, so that, *in the case of salvage proper*, where no bargain is made for remuneration, and the right to remuneration for successful service depends merely upon the general maritime law, the expense cannot be recovered under the suing and labouring clause. It is, however, not beyond the competence of the House of Lords to reconsider the principle of that decision, having regard to the considerations brought to bear on the question in the 6th edition (1887) of Arnould on Insurance, by David Maclachlan. See his note, p. 807. To aid the construction of the words “sue, labour, and travel” in the clause, which probably stood in a Lloyd’s policy so early as the latter part of the reign of Henry VI. (say about 1450), Mr. Maclachlan cites, from the Paston letters as edited by Mr. Gairdner, comprised within the period 1422–1509, and from an extract given by Mr. Gairdner of a petition of the widowed Countess of Warwick shortly after the death of her husband (the Kingmaker) in 1471, various passages clearly showing that the word “labour” was within that period used in an idiomatic sense, namely, to persuade or prevail upon another to take trouble or use influence on behalf of the person concerned. So that, adopting this idiomatic meaning, the words “sue,” “labour,” and “travel”

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would each have a definite and intelligible meaning,—the word “sue” in its obvious sense of “ask” or “petition;” the word “labour” perhaps including that, and at all events signifying something more, to be briefly rendered “persuade” or “prevail upon;” the word “travel” (or “travail”) having obviously the meaning of the word “labour” in its modern popular sense.

It is impossible to ignore the weight of these considerations, which have apparently escaped the notice of modern authorities, and even the usually exhaustive research of Lord BLACKBURN. Whether they would induce the House to overrule their own decision, if the facts in another case were precisely similar, can hardly be predicted; but in any Court which is not bound by the authority of the House of Lords, they must certainly be taken into account. Assuming Mr. MacLachlan’s construction to be right, it might still be a question whether the clause could apply to the expenses of salvage of a derelict ship; but it would perhaps be hypercriticism to draw the line at such a case.

Where live cattle were insured on a voyage from New York to Glasgow against “all risks, including mortality from any cause whatsoever:”—the ship was obliged by stress of weather to put into Halifax, where she was detained seventeen days for necessary repairs, and there the insured of the cattle ordered and paid for extra fodder for them. It appeared that a supply of fodder sufficient for an ordinary voyage had been provided before the vessel left New York, but that if it had not been for the extra supply some of the cattle would have died. It was held that the insured were entitled to recover the expense of the extra fodder under the suing and labouring clause. *The Pomeranian* 1895, P. 349, 65 L. J. P. 39.

It has been held that, under this clause, the insured are not entitled to expenses incurred pending the voyage to ascertain whether damage has been done, if none has occurred in fact. *Lysaght v. Coleman* (C. A. 1894), 1895, 1 Q. B. 49, 64 L. J. Q. B. 175, 71 L. T. 830.

## AMERICAN NOTES.

Parsons cites this case in the Exchequer Chamber, L. R. 2 C. P. 357 (2 Marine Insurance, p. 155). In addition to the case of *Schieffelin v. N. Y. Ins. Co.*, 9 Johnson (N. Y.), 21, the doctrine that transshipment is the duty of the master when it will obviate loss is sustained by *Bryant v. Com. Ins. Co.*, 6 Pickering (Mass.), 130; *Hugg v. Augusta Ins. & B. Co.*, 7 Howard (U. S. Supr Ct.), 595; *Adams v. Haught*, 14 Texas, 243; *Williams v. Kennebec M. Ins. Co.*, 31 Maine, 455; *Smith v. Martin*, 6 Binney (Penn.), 262; *Treadwell v. Union Ins. Co.*, 6 Cowen (N. Y.), 270. Beach cites the principal case (2 Insurance, sect. 954).

Ordinarily official duties are not to be compensated by salvage. *Hobart v. Drogan*, 10 Peters (U. S. Supr. Ct.), 120.

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The principal case is largely commented on in *Alexandre v. Sun M. Ins. Co.*, 51 New York, 253, where the holding was that the "suing and laboring" clause does not embrace expenditures to repair losses caused by risks insured against. The Court said: "This case is a clear authority that the plaintiff's rights in the case before us are not prejudiced by the non-existence of an abandonment. On the other branch of the case the authority is not so strong. The vessel was in port at Balize. The general average expenses of \$581 had been incurred, for which the defendant is responsible. There she was, and such as she was, her owners had, and could use her in their discretion. It was not like the case of the freight which required an expenditure to give it an actual existence. The vessel was present in port physically. How much she was worth there before the repairs, or how much she was worth there after the repairs, does not appear. Nor does it appear whether she was worth more or less there than in New York. But she was there and had some value. I do not see how it can be said that the repairs at Balize were about the 'defence, safeguard, or recovery' of the vessel. She needed no defence or safeguard. She was quietly in the port of a friendly nation. She was safe from storms or perils, nor was any expense needed or incurred for her recovery. She was in the master's hands, and no one proposed to interfere with her. Although she would not have been safe at sea, she was safe at port. Expenses for the safeguard of a ship cannot properly be said to be those by which she is put in a condition of seaworthiness. The two ideas are essentially different. The sum of \$8769 spent at Balize was for the improvement of the vessel, rather than for her safeguard, defence, or recovery."

"Upon an examination of all the cases to which attention has been called, I have not been able to find any that would authorize this recovery; nor do I think it comes within the spirit of the contract. Had full repairs been made at Balize, the defendant would have been liable for them only to the amount of its insurance. The repairs were made for the improvement of the vessel, and these, it has been held, are not within the suing and laboring clause. The expenses were not incurred for the defence, safeguard, or recovery of the property. There was no impending disaster against which they formed a protection. In my opinion, neither upon this clause nor upon the general terms of the policy can the claim of the plaintiffs be sustained."

The principal case is cited and approved in *Cory v. Boylston F. & M. Ins. Co.*, 107 Mass. 140; 9 Am. Rep. 14.

In *Buzby v. Phoenix Ins. Co.*, 31 Federal Reporter, 422, it was held, on the authority of *Aitchison v. Lohre*, 4 App. Cas. 755, that under a policy of insurance containing the clause, "free from particular general average less than fifty per cent." there can be no recovery from the insurer of salvage and agents' expenses, where there are other insurers and the proportion of loss payable by respondent is less than fifty per cent of the amount of the policy. The Court said: "The question is one of much importance and considerable difficulty. In this country it is undecided. It was so in England until the recent case of *Aitchison v. Lohre*, 4 App. Cas. 755, when it was determined in favor of the insurers. Without this authority I am not certain what conclu-

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sion I would reach. A discussion of the question now would be but a waste of time. All that can be said on either side was said by the distinguished counsel who appeared in *Aitchison v. Lohre*, and the very eminent Judges who there filed opinions. That case has settled the law for England, and the great importance of uniformity in the rules governing commerce, and all contracts respecting it, in that country and this, induces me to accept the conclusion there reached."

SECTION VII.—*Deviation and Change of Voyage.*

See DEVIATION, 9 R. C. 351—419.

SECTION VIII.—*Loss. Causa proxima spectatur.*

No. 74.—*IONIDES v. UNIVERSAL MARINE ASSOCIATION.*

(1863.)

## RULE.

WHERE property is insured against certain classes of perils, or where certain classes of perils are excepted, the rule is "*Causa proxima non remota spectatur.*"

The navigating captain of a ship having lost his reckoning, ran his ship aground, and she was consequently wrecked. At the time of the occurrence, owing to the war between the Northern and Southern States of America, a certain light had been extinguished which, had it remained alight, would have enabled the captain to avoid the disaster. The insurance was expressed to be "free from (*inter alia*) all consequences of hostilities." Perils of the sea, and not the hostilities, were held to be the proximate cause of the loss; and the insured was entitled to recover.

*Ionides v. Universal Marine Association.*

32 L. J. C. P. 170—181 (s. c. 14 C. B. (N. S.) 259).

*Insurance.—Excepted Risks.*

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The plaintiff effected a policy of insurance on 6500 bags of coffee, "warranted free from capture, seizure, and detention, and all the consequences thereof,

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or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions." At the time the vessel set out on her voyage from Rio de Janeiro to New York, a war was raging between the Northern and Southern States of the United States of America, and as an act of hostility, persons in the military service of the Southern States had extinguished a light which had up to that time been kept burning at a lighthouse at Cape Hatteras. The captain, from ordinary causes, got out of his reckoning, and, in consequence, ran ashore on Cape Hatteras. If the light had been burning, the captain could have seen it, and could have avoided the damage. When the ship went aground she was boarded by two officers in the military service of the Southern States, with some show of taking possession of her and her cargo. Certain persons acting in the employ of the Northern States as salvors then commenced taking the cargo out of the ship; they took out 120 bags, when the soldiers of the Southern States again interfered, and prevented more being taken out. If this interference had not taken place, 1000 bags, in addition to the 120, but not more, could have been saved. From the first there was no hope that the ship could be got off. *Held*, that the insurers were liable as for a partial loss. That as the 1000 bags would have been saved but for the direct act of the soldiers, the loss of these was covered by the exception. But that for the loss of the remainder the insurers were liable, as they were lost by the perils of the sea; and the putting out the light, though an act of hostility, was too remotely connected with the loss to be considered as the cause of it, and so bring it within the exception.

*Held*, also, that if a ship and cargo be reduced to such a state by the perils of the sea, as that there is no hope of recovery, but, while they still exist in specie, they are nominally taken possession of by persons in the military service of a belligerent State, this is a loss by perils of the sea, and not by capture.

The declaration in this case was upon a policy of insurance made by the defendants in respect of the sum of £3000 upon 6500<sup>1</sup> bags of coffee, valued at £25,000, warranted free from particular average, unless the ship should be stranded, sunk, or burnt; general average payable as per foreign statement; warranted also free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free [\* 171] from all \*consequences of hostilities, riots, or commotions, by the ship or vessel called the *Linwood*, lost or not lost, at and from Rio de Janeiro to New Orleans <sup>and</sup> or New York, calling at Belize for orders, including the risk of craft. The policy also contained a covenant that the said insurance should commence upon the goods and merchandise on board the said ship from the loading of the said goods or merchandise on board the said

<sup>1</sup> There was some little confusion about the numbers of bags as stated in the argument, but the above numbers are sufficiently correct for the purpose of the point of law here decided.

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ship or vessel, at as above, and until the said goods or merchandise should be discharged or safely landed; and that it should be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any ports or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to the said insurance. And touching the adventures and peril which the defendants were made liable to by the said insurance they were declared to be of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of the said insurance or any part thereof. The declaration then averred, that the coffee was placed on board the said ship, and that, while it was so on board, the ship was stranded, and afterwards, and during the continuance of the said risk, the said goods were by divers of the perils insured against, and not by any of the excepted perils, totally lost.

The defendants pleaded to this count that the goods were not lost by any of the said perils insured against by the said policy; and that the goods were lost by certain of the perils from which the same were by the policy warranted free.

The action was tried before ERLE, Ch. J., at the sittings in London after Hilary Term, when it appeared that 6,500 bags of coffee were shipped on board the *Linwood*, at Rio, on the 24th of May, 1861. On the 26th of May she sailed from Rio, and on the 1st of June arrived at Belize, at the mouth of the Mississippi. On the 3rd she left Belize for New York, and proceeded on her voyage until the night of the 17th, when the captain, thinking he had already passed Cape Hatteras, changed his course from N. E. to N. and he continued this course until about half-past eleven, when she went on shore. It was found that she had taken the ground about ten miles to the southwest of the point where the light used to be on Cape Hatteras.

At the time the ship left Rio, and for some time previously, there had been a conflict between the Northern and Southern States of the United States of America. The former were generally distinguished by the name of Federals and the latter by

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that of Confederates. By foreign nations generally, and between themselves to a considerable extent, the two parties to the conflict were respectively treated as independent belligerent States, to which the ordinary law of nations as regards belligerents was applicable.

Up to the 15th of April preceding this disaster, there had always been a light on Cape Hatteras, but on that day it was extinguished by order of the State authorities of the State of North Carolina, which had joined the Confederates. The object of so doing was to hinder the Federal navigation. The fact both of the existence of the war and of the extinction of the light was unknown to the master of the *Linwood* until the day after the disaster. His vessel was the property of Federal owners, and the cargo that of a British merchant.

On the morning of the 18th of July, two officers of a militia regiment of North Carolina, who were then in charge of that part of the coast, came on board the *Linwood*; but, after remaining only a short time, returned on shore taking the master with them, and in the course of the same day both he and the crew were made prisoners, and not allowed again to go on board the vessel. No portion of the cargo was removed, or could be removed, on that day, on account of the rough state of the weather. On the following day 120 bags of coffee were safely landed from the ship by certain persons called wreckers, but who were, in fact, salvors, and who acted under the orders of an officer holding a commission for that purpose under the Federal government.

A thousand bags more could have been saved but for the [\* 172] interference of the \* soldiers of the above-mentioned militia regiment, who prevented it. The ship broke up on the 20th, and all the coffee but the 120 bags which had been brought on shore was totally lost.

The above facts were admitted at the trial, when a verdict was entered for the plaintiff for the amount claimed, leave being reserved to the defendants to move to enter a nonsuit, or to reduce the damages, on the ground that the loss was occasioned by the excepted perils, or at least that a partial loss was by such perils turned into a total loss. The Court to have power to draw such inferences as a jury might draw from the above facts.

Brett, in this term, obtained a rule accordingly.

Bovill, Lush, and Honyman showed cause. — The question is,

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whether the cargo was lost by capture, seizure, detention, or the consequences thereof, or any attempt thereat, or by the consequences of hostilities, riots, or commotions. It is said, that the ship's going ashore at Cape Hatteras was caused by the light not being there, and that the light not being there was a consequence of hostilities. It may be admitted, for the purpose of this argument, that if there had been a light on Cape Hatteras the captain could have seen it, and could have put his ship about in time to prevent her running ashore. Still it is contended that the loss of the ship was not a consequence of hostilities, in the sense in which those words are used in policies of marine insurance. It is a received maxim of law, that in construing those policies *causa proxima non remota spectatur*. The maxim itself is stated, and the cases collected in Broom's Legal Maxims, 3rd edit., 202, 203, and in Marshall on Insurance, 4th edit., 375. The application of this maxim sometimes extends, sometimes restricts the liability of insurers. In *Busk v. The Royal Exchange Assurance Company*, 2 B. & Ald. 73 (p. 332, *post*), in an action on a policy on a ship, by which, amongst other risks, the underwriters insured against fire and barratry of the master and mariners, it was held that they were liable for a loss by fire occasioned by the negligence of the master and mariners. In *Powell v. Gudgeon*, 5 M. & S. 431 (17 R. R. 385), on the other hand, where the ship, being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master, having no other means, was obliged to sell a portion of the goods, it was held that this was not a loss of the goods by the perils of the sea for which the underwriter was liable. In the present case the proximate cause of the loss was the stranding of the ship. No doubt the putting out of the light at Cape Hatteras had something to do with this, and so the loss is in a remote way connected with the hostility between the Northern and Southern States. But a cause much more directly leading to the loss than the absence of the light was the captain getting out of his reckoning. With that the hostilities had nothing whatever to do. Suppose this had been the case of a ship reinsured against the excepted perils, and an action had been brought on this policy of reinsurance,—could it have been said that the underwriters were liable as for a loss caused by hostilities? Surely not. It would have been said

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that the loss was caused by the ship's stranding, and that this was a peril of the sea. It will also be said that, supposing the ship's stranding not to be a consequence of hostilities, still that the underwriters are not liable, for that there was a subsequent total loss by capture. But it is contended that, when once the ship was stranded without hope of recovery, there was a total loss of ship and cargo, and all that happened afterwards is a matter of total indifference. As soon as the ship went ashore she might have been then and there abandoned. There are numerous cases which show that this is the correct view of the law. In *Lirie v. Janson*, 12 East, 648 (11 R. R. 513), the ship was not lost by stranding; there was, from the first, every probability that she would be, and in fact she was, got off. Her capture, therefore, as she lay aground, was rightly held to be the true cause of loss. This is pointed out by the Court of Queen's Bench in *Knight v. Faith*, 15 Q. B. 649; see p. 668; 19 L. J. Q. B. 509. *Patrick v. the Commercial Insurance Company*, 11 Johns. Rep. (N. S.) 9 and

[\* 173] 14, is a precisely \* similar case. The case of *Hahn v. Corbet*, 2 Bing. 205 (27 R. R. 590), is very like the present. That was the case of an insurance on goods in a ship warranted free from capture and seizure. The ship was stranded, and disabled from proceeding, and as she so lay she was captured by the enemy. But the Court held that, because the ship was lost when stranded, without hope of recovery, there was a total loss of the ship by the perils of the sea; and that, consequently, there was a total loss of the cargo on board her by the perils of the sea also. The case of *Lirie v. Janson*, is there commented on and distinguished. They also cited *Hagedorn v. Whitmore*, 1 Stark. 157; *Tatham v. Hodgson*, 6 T. R. 656; *Lawrence v. Aberdein*, 5 B. & Ald. 107 (24 R. R. 299); *Redman v. Wilson*, 14 M. & W. 476, 14 L. J. Ex. : 33; *Busk v. The Royal Exchange Insurance Company*; *Montoya v. The London Assurance Company*, 6 Ex. 451, 20 L. J. Ex. 254; *Palmer v. Naylor*, 10 Ex. 332, 23 L. J. Ex. : 23; *Thompson v. Hopper*, 6 El. & B. 937; and, in error, 1 E. B. & E. 1038, 27 L. J. Q. B. 441.

Brett, Mellish, and Maclachlan, in support of the rule.—The putting out of the light at Cape Hatteras was the substantial cause of the loss of the ship and cargo. It is admitted for the sake of the present argument that if the light had been burning the captain would have seen it in time to have put his ship about. And if that had been done, the ship would not have been stranded

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The loss, therefore, was within the meaning of the warranty, and the underwriters are not liable. The principle of *causa proxima non remota spectatur* is not disputed by the defendants, but the question here is as to the meaning of the words in this warranty; and it is submitted that it was in consequence of that principle, and the knowledge that in case of a ship being wrecked in its attempt to avoid capture, the underwriter would not be protected by a warranty of free from capture, that the word "consequences" was introduced into the present warranty. The effect of the introduction of that word is to make the warranty the same as if it had said "free from hostilities and all the consequences thereof." The parties have therefore in this case excepted out of the policy certain losses by sea peril, namely, such as are the result of acts of hostility. Next, there was only a partial loss of the cargo by perils of the sea; a certain portion was in fact saved, and it appears from the evidence that a considerable portion more might have been saved but for the acts of the Confederate troops. It is submitted that what took place amounted to a capture of the goods by the Confederates on the Wednesday after the stranding of the vessel. It is not necessary to constitute a capture that the enemy should put men on board *The Edward and Mary*, 3 Rob. Adm. Cas. 305, and *The Hercules*, 2 Dodg. Adm. Rep. 353. There was therefore a total loss of the goods by capture, for the capture being subsequent to only a partial loss, and being before a total loss by the perils of the sea, the underwriters are protected by the warranty as for a total loss by capture. The plaintiff relies on the case of *Hahn v. Corbet*, but there it was found as a fact by the Court that there had been a total loss of the goods by the perils of the sea before capture. If there had been no enemy to have taken them they could never have been saved from the sea. That is not the present case, where it is evident that 120 bags were safely landed and 1000 bags more could have been saved but for the interference of the enemy. The case is therefore brought within the principle of *Green v. Elmslie*, 1 Peake, 278 (3 R. R. 693). If, however, there was not a total loss by capture, there was a partial loss at any rate in consequence of hostilities, and to that extent at least the underwriters are entitled to the benefit of the exception in the policy.

ERLE, Ch. J.—In this case I am very much obliged to the learned counsel who are concerned on both sides for their very able argu-

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ment, the result of which is, in my opinion, that we ought to give our decision in favour of the plaintiff in respect of a partial loss.

This was an action upon a policy of insurance upon coffee, [\* 174] and the policy contained \*this clause of exception: "Warranted free from capture, seizure, detention, and all the consequences thereof, and of any attempt thereat, and free from all the consequences of hostilities, riots, and commotion." It turns out that the insured ship, with a cargo of coffee on board, in proceeding from Belize to New York, had to pass by Cape Hatteras. What the captain intended, was to steer northeast till he had rounded the Cape, and then to steer due north to New York; but he got out of his reckoning, and when he was thirty miles south of the Cape and ten miles westward of it, thought that he had passed it. The consequence was that turning to the north too soon he ran ashore.

If there were nothing more in the case, it would be a clear loss by perils of the sea; but there is this further fact to be taken into consideration, that at Cape Hatteras there had been maintained, until the secession of North Carolina from the United States, a lighthouse, and when, at the outbreak of the present war in America, North Carolina seceded and sided with the Confederate States, the light at Cape Hatteras was put out for a hostile purpose; the Federal ships being likely to suffer from the want of the light, if they had to pass Cape Hatteras.

I also take as a fact for the purpose of this judgment that, if there had been a light on Cape Hatteras, the captain could have seen it and could have put his ship about, and if he could have seen it and could have put his ship about, that the ship would not have been lost in the manner in which it was.

Now the grand contention upon the first part of the case is, whether the loss of the ship was a loss caused by the consequences of hostilities within the meaning of this policy. I quite agree with the learned counsel who have argued the case on both sides that it is a question of construction; and that the intention of the parties is to be gathered from the words in the instrument with the surrounding circumstances. The words are not so usual as to have been the subject of judicial interpretation before, and it is my duty at the present moment to put that construction upon them which I think the parties to the instrument intended. I quite agree with the learned counsel who, in the course of the argument, have either

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affirmed or conceded, that these words are to be construed in the same way as if the assured had reassured his cargo against those perils which are excepted in the warranty that we now have to construe. So that, if the action had been on that policy of reassurance, and the ship had been lost in the manner I have stated, then it would have been the duty of the Court to say whether the putting out of the light, which was a consequence of hostilities, was so connected with the loss of the ship as to make the insurer liable.

The words are to be construed with reference to the known principle pervading insurance law, *causa proxima non remota spectatur*. The relation of causation is a matter that cannot be often distinctly ascertained; but if, in the ordinary course of events, the one antecedent is constantly followed by the other sequence, they may be taken to stand, in common parlance, in the relation of cause and effect.

Now, in the present case, were the putting out of the light and the loss of the ship so connected together as to stand in that relation in the ordinary course of events? I think they were too distantly connected with each other to stand in that relation.

I will put an instance of what I consider a consequence within the meaning of this policy. Supposing there was a hostile attempt at the seizure of the ship, and the enemy was to follow the ship, and the ship to escape seizure was to run aground or to run ashore, the loss would be then caused by the attempt at seizure, and it would be within the exception.

I will suppose again that the enemy gave chase to the ship for the purpose of seizing her, and to avoid being seized she got into a bay where there was neither anchorage nor port, and the wind on-shore, and where, if the wind so continued, it was physically certain that she must be lost, I should say that the ship, being driven on shore by the wind, under those circumstances, was lost by the consequences of an attempt at seizure, and that it would be within the exception. The exception has reference to seizure and the consequences thereof, or of any attempt at seizure.

I will suppose a third case, that is, that the wind did change, and that the ship got \*out of the bay and proceeded on her voyage, and afterwards in the course of the voyage was overtaken by a storm, which she would have avoided by having arrived at her port if she had not been obliged to devi-

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ate and delay by reason of the attempt at seizure. If she foundered in the storm, there would be then a loss which never would have occurred if there had not been the attempt at seizure. But the loss would not be connected with that attempt in that proximate relation which, in the ordinary course of events, is necessary to connect the loss with what is called the cause of the loss. The ship going out of the bay and proceeding on her voyage, it is not a sequence in the ordinary course of events that if a storm should overtake her she should sink in the course of that storm. I suppose, as a fact found in the case, that if she had not been obliged to deviate she would have been safe in port before the storm came on. Then I should say that, although the consequence of the attempt at seizure was the cause without which the loss never would have happened, yet it is not the efficient cause of it, in the language used in some of the cases analogous to this, or the proximate cause of it, in the language of some other cases. The one fact is too remote from the other to call it a loss by the consequence of hostilities, and, therefore, it would be a loss by perils of the sea.

Take another instance. The warranty extends to loss from all the consequences of hostilities. I will assume that the ship is destined for a port where there are two channels of entrance. In one of those channels there is a torpedo which has been laid down for hostile purposes: in the other there is none. If the master of the ship coming into the port knows nothing of the torpedo and the ship is sunk and destroyed, there, of course, the consequence of hostilities leads directly to the destruction. The hostilities having induced the occupiers of the port to lay down the torpedo, if the ship struck on it and was destroyed, this is the consequence of hostilities, which are the proximate cause of the loss, and so the loss is within the exception. But suppose the master is aware that the torpedo is there, and for the purpose of avoiding the torpedo he takes the other channel, and from bad navigation the ship runs aground there, and is lost. In my opinion that would be a loss not within the exception, because by good navigation she might have passed through safely. I should say that the ship so lost would be lost by the perils of the sea, within the meaning of the policy.

Now, let us apply these considerations to the present case. The captain had missed his reckoning, and either not having a sufficient look-out, by which he would have seen the breakers ahead when

he was coming towards the shore, or not lying to in the night, when he doubted of his position, he runs on shore. And it is not, in my opinion, the absence of the light which proximately causes the running on shore, within the meaning of marine policies. It would, therefore, follow that the wreck of the ship is not within the exception, but is within the policy; and if the wreck of the ship brought about the loss of the cargo, the insurer of the cargo is, so far, to be considered liable.

But then follow the subsequent events. The ship struck on the Tuesday night. On the Wednesday the weather was too rough to save the cargo. On the Thursday the weather was smooth enough, and considerable part might have been saved. One hundred and twenty bags were saved, and 1120 might have been saved, but that the Confederate troops came down and interfered with the officers of the Federal government, who had the duty to save the cargo, and who were salvors in fact, though they are called wreckers.

No doubt, when the ship was wrecked at first, and there was no appearance of being able to save any of the cargo, there was presumably a total loss of the cargo. But when the course of events showed that the ship had not gone to pieces, and there was a part of the cargo, at least, that could have been saved, then the presumption of a total loss ceased. When a part of the cargo was actually saved, of course that presumption was demonstrated not to apply to that, and I take it to be found as a fact that 1000 bags more could have been saved, but were prevented from being saved in the manner I have mentioned. Those 1000 bags, as between the parties to this instrument, must be taken to have been, if I may say so, potentially saved, and they would have been saved, but that \* saving was prevented by the consequences of [\* 176] hostilities and commotion. That being so, those 1000 bags were brought within the exception in this policy, so that, with respect to them, the loss was a loss for which the underwriters are not liable. One hundred and twenty bags were not lost at all; for 1000 bags the insurers are not liable, although they were lost; but for 5380 bags the insurers are liable, for to that extent, it appears to me, there was a partial loss within the meaning of this policy.

It was gravely contended by the learned counsel for the defendants that there was a total loss of the cargo by capture; and if there was a total loss of the cargo by capture, that would be within the warranty of exceptions, and the insurer would not be liable.

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But it appears to me that none of the authorities apply to the case that is now before the Court. It appears to me that the ship was in a state of wreck; that the cargo was in the nature of wreck; and that the act of the troops, in all that they did on the wreck in relation to the cargo, was the act of collecting what they could despoil from the wreck for themselves, and by no means the act of troops taking possession of a ship, or of a cargo, in the capacity of troops making a capture.

I think, therefore, that the verdict ought to be for the plaintiff for the value of the 5380 bags, the loss of which, in my opinion, was covered by the policy.

WILLES, J.—I am of the same opinion upon all the points.

There are three matters with reference to which the case may be considered. First, with reference to the effect of there not being the usual light at Cape Hatteras. Secondly, with reference to the wreck and its immediate effects. Lastly, with reference to the hostile seizure by the Confederate troops. Now, so far as the absence of the light is concerned, the question to be considered is, whether the loss of the vessel, in consequence of the possibility, or indeed the strong probability (as enforced by Mr. Maclachlan in his able argument) of her escape from shipwreck, if the light had been there, is to be attributed to the consequence of the hostile act of putting out the light. It may have been, in one sense, the cause of the loss; but it was not the proximate cause. It was not the absolute certain cause of the loss. The proximate and absolute certain cause of the loss was the fact of the vessel taking a wrong course, and getting on the rocks at Cape Hatteras. Now, I apprehend that, as soon as that is stated, the only question remaining to be considered is, whether there is to be applied to this case the ordinary rules of the insurance law, namely, that you are not to trouble yourself with distant causes; that you are not to go into metaphysical distinctions between causes efficient and causes material, and causes final, and so on of the rest of them, but you are to look to the proximate and immediately operating cause of the loss, and to that only; that is, whether the ordinary rule of insurance law is applicable to this policy. It has been argued that it is not applicable to this policy, because of the introduction into the exception of the words "all consequences of hostilities;" assuming, as I also intend to do, that the acts of the persons called Confederates are to be treated as hostilities. But I apprehend that

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that is quite a fallacious argument on the part of the defendants. I apprehend that, in putting a construction on this exception, you are to look only to the proximate consequences of hostilities, notwithstanding the use of the word "all" in that part of the policy which is for the benefit of the insured. The introduction of the word "all," as everybody must be aware, is unnecessary, because no rule of grammar can be more clear, and no rule has been longer adopted in the law, than that words general and words universal are all one. It seems to me that the proper construction to put on the words "all consequences of hostilities" is the construction which you would put on the words "consequences of hostilities." They mean nothing more nor less. They refer to the totality of causes to be considered, not to their sequence, or their proximity, or their remoteness.

I will put this case: I will assume that a vessel upon the same course as this vessel was leaving Rio, and that the captain was acquainted with the fact that the light on Cape Hatteras had been extinguished by the Confederates, the result of which is, that he keeps further out to sea, and so goes \* on shore on [\* 177] an island which he would otherwise have avoided, and his vessel is wrecked. To take the consequences one step further, I will suppose that the vessel is wrecked for want of a light there, which has been extinguished by a mariner, who had been himself shipwrecked by reason of the light having been extinguished by the Confederates at Cape Hatteras, and who, being embittered against all mankind, had proceeded to put out the light on the island where the vessel is wrecked. That is a case in which the vessel is unquestionably wrecked, in some sense, in consequence of the light having been put out on Cape Hatteras; but can any person in his senses, dealing with the law of insurance, which regulates men of business and their affairs, suppose that that consequence is a consequence which is covered by this exception?

But, if you cannot carry the exception of consequences of hostilities into all consequences, however remote, you are necessarily driven to that with which I started, namely, to say that consequences here must be dealt with according to the ordinary rule as proximate consequences.

Nor is this a rule which is for the benefit of the assured only. It is also applied for the benefit of the insurer, and it is unnecessary to give any further instance of that than the well-known case of

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*De Vauv v. Salvador*, 4 A. & E. 420, 5 L. J. (N.S.) K. B. 134 (p. 305, *post*), which made it necessary to add another clause to policies. The insurers and the insured are equally bound by the rule, and applying that rule to this case, the wreck of the vessel was as between these parties, and according to the law applicable to the contract which they had entered into, a wreck by the perils of the sea, and not a wreck in consequence of hostilities.

Now I come to the next portion of the case, I mean the wreck and its effects. I prefer dealing with that before dealing with the effect of hostilities. The facts have been stated, and it is enough, therefore, in order to introduce my judgment on this point, to say shortly that the vessel was stranded, and was totally lost from the moment she went on the rocks, without hope of recovery. With respect to the cargo that was on board of her, the general law, I apprehend, is simple. The vessel having been shipwrecked, and having taken water by the shipwreck, those facts of themselves would have been sufficient to give rise to a right to abandon, not only as regards the vessel, but a right as regards the cargo. And this is not a rule peculiar to our own, but is common to most systems of law. In illustration of this, I need only refer to the Treatise of Emerigon, vol. i. pp. 401, 402, ed. Boulay-Paty, 1827, where he gives an instance in which the vessel went ashore, both *naufrage* and *bris*; part of the cargo was saved, damaged, and part of the cargo was saved, not damaged; and there that most learned and experienced of lawyers seems to consider that it was a case of abandonment, notwithstanding the saving of a portion of the goods in an undamaged state; and he does so for the reason which has been stated by Mr. MacLachlan, in his argument, that the law in these cases avoids the raising of questions which it would, in the great majority of cases, deem impracticable to determine, or determine with precision.

I am quite aware that this has not been adopted to its full extent in our jurisprudence, or in that of America; but it may serve as an introduction, because it shows that the experience of mankind is in favour of the proposition which the authorities seem to furnish, namely, that where there is a wreck of a vessel, without any hope of recovering her, the cargo is to be treated as also lost if the circumstances are such that no part of it can be recovered for the use and benefit of the persons insured. Take the case of a vessel wrecked on an uninhabited island, where the removal of the goods

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from her, the sending out a vessel to do so, and bringing the goods home, would be ruinous, in comparison with the value which the goods would fetch when brought home. Of course you have there a case of absolute total loss immediately. Take, again, the case of a vessel being wrecked where the inhabitants of the island are savage people, who seize a portion of the goods, or, a portion of the goods being saved by the crew, the crew are immediately deprived of them by the savage people of the place. There, again, you have the case of a total loss. That is the case of *Bondrett v.*

*Hentiggy*, Holt's N. P. 149 (17 R. R. 625). \*There part of [\*178] the goods was lost, part was got ashore, and the wreck was destroyed and plundered by the inhabitants of the coast, so that no portion came again into the possession of the assured ; and Chief Justice GIBBS there deals with the case as one of a total loss ; and he gives this reason, that the portion of the goods which were saved from the wreck, and which they got ashore, never came again into the hands of the owner. He treats that as a proximate consequence of the wreck which has taken place under those circumstances. Therefore it is not necessary that the ship should be in a condition where it is physically impossible to get any of the goods out of her. You must take all the circumstances into account for the purpose of determining whether any of the goods can be saved for the benefit of the owner. Now you might put as opposed to that the case of a vessel, such as we all have heard of, going down at the entrance of a dock at the port to which she is bound, the insurance still continuing, and the goods unimpaired, and all capable of being restored with very little difficulty. It is very easy to imagine any number of cases between those two, but it would be a waste of time to do so. Those seem to be the two cases at one extreme and at the other of the list which would be necessary for the purpose of illustrating the rule.

Now what have we in this case ? We have the vessel absolutely wrecked, and the goods in this condition, that it is possible, consistent with the laws of nature, to save 1120 bags of them. It is impossible to save the 5380. I apprehend the conclusion of good sense and also of law upon that is, that the 5380 as to which the loss is certain when the ship strikes are as absolutely lost as the ship itself, at the same moment when she struck the rock. With respect to a thousand bags of them, under the ordinary state of things, if there had been no hostilities (still using that word in the

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sense which I said I should apply to it throughout), they would have been saved to the owner, subject to the salvage that was properly payable. This being the state of things we have to consider, what was the effect of hostilities as to the 1000 bags? With respect to them, I quite agree with the argument on the part of the defendants that it was a consequence and a proximate immediate consequence of those hostilities that this portion of the cargo was not saved. I had turned over in my mind whether, as only 120 bags were actually brought on shore, and as the 1000 bags remained exposed to the original peril, and were lost by a consequence of it, whether this remark ought not to be confined to the 120 bags; but I do not think that would be dealing substantially with the question. The 1000 bags, I think it must be taken, were kept from the shore by the operation of hostilities.

Now comes the question whether the hostilities had any effect on the rest of the cargo? Much reliance was placed on *Livie v. Janson*, and many observations were made on the case of *Hahn v. Corbet*. With respect to *Hahn v. Corbet*, I think the learned counsel for the defendants have established a sound distinction between that case and the present, because there the vessel was wrecked in such a position that, but for the subsequent coming of the enemy and taking a portion of the cargo which they removed from the vessel, the whole would have been lost. It was a case therefore in which the vessel was wrecked under circumstances in which there was no probability or possibility of the goods being saved, under the circumstances, for the benefit of the owner. There was no *spes recuperandi*, and the goods which were taken by the enemy had been previously placed in a position to be totally lost to the owners. Then, on the other hand, I do not think the case of *Livie v. Janson*, which was said to be the same as this, does at all apply, because in *Livie v. Janson* what had taken place before the capture was a simple deterioration of the vessel. The vessel was simply deteriorated; there was no total loss of any part of the adventure; she was injured but not destroyed as to the whole or part by the perils of the sea; and it was said that her subsequent immediate capture had the effect of entirely putting out of question the previous injury which she had received, because had she been the best vessel that ever sailed the seas, and without any injury whatever, she would have been immediately captured, and entirely lost to the assured, and captured by reason of an excepted peril.

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That appears to me to be wholly inapplicable to a case where there \* was a previous absolute loss or total loss, in [\*179] the sense in which I use the word total, of the subject-matter in respect of which the assured seeks to recover; and that by perils of the sea. I cannot pass over *Livie v. Janson* without referring to the very able and learned work of Mr. Phillips on Insurance, in the first volume of which, at p. 673, he throws a doubt on *Livie v. Janson* and refers to cases in the Courts of his own country where the principle of that case has not been applied to an absolute loss of a portion of the thing insured. But without at all saying I go the length which Mr. Phillips goes in that work, to say that *Livie v. Janson* is not law, I am clear it can apply only to cases such as where a vessel is deteriorated, and not to the case of the subject-matter of insurance being absolutely lost by the perils of the sea.

Now, I must come a little closer to this point, that is, to the question whether there was a capture of the 5380 bags, and for that purpose I will assume that *Livie v. Janson* applied. It appears to me there was no capture of the 5380 bags of coffee. Those 5380 bags of coffee were incapable of being saved; and it seems to me that it would be an abuse of language to say that a man captures a thing which must of necessity be snatched from his grasp the next moment by the waves; a thing of which he can have no enjoyment and no possession. It has been said, *Ipsum compedibus qui vinixerat Enosigatum*. One may say that poetically, but to say that a man captures a cargo which is on the rocks, and which cannot be got on shore, is to say that which is not the fact. The 5380 bags were lost to the assured, and were lost to all mankind, from the moment that they were on the rocks without any possibility of their being brought on shore. The result is, as it appears to me, that the 5380 bags of coffee were lost by the perils of the sea; that the 1000 were lost by the consequence of hostilities; and with respect to the former there ought to be judgment for the plaintiff, with respect to the latter for the defendants.

BYLES, J.—I am of the same opinion. I speak for myself when I say that neither when I had the honour of a seat at the bar, nor since I have been in this place, have I ever been more assisted by the able arguments of counsel than I have been on the present occasion. I think the result is to make the case perfectly clear.

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I will assume for the present purpose that the light at Cape Hatteras would have been visible had it been lighted in the usual way, and that the captain would have seen it, and would have recognised it, and that he could and would have turned about his vessel in time to avoid running on shore. Then, is the absence of the light, which was at the most but the absence of an extrinsic saving power, a link in the chain of causes to which the destruction of the ship is to be imputed? I do not propose to discriminate between the various sorts of causes—which is a matter that has been discussed by abler intellects than any that now exist 2000 years ago; but this is plain and admitted on both sides: that in a contract of the nature of a policy of insurance the proximate or immediate cause is the only cause at which the Court can look. I do not enter into the reasons for that; it is established upon authority all over Europe and America, and there is no doubt at all about it; and every judgment of this Court must proceed on the hypothesis that it is established law.

Then what were the three causes here, which — upon the assumption that the captain would have seen the light had it been there, and have saved his vessel—have caused the loss? First, the original meritorious cause, and in popular language the cause of the loss, was the miscalculation of his position by the captain. He was fifty miles to the westward of his course, and he did not know that. Now comes the absence of the light, which was, as I have said, but the absence of an extrinsic saving power, and, in that sense, was that the cause of the destruction? As was said in the course of the argument, if a person throws himself into the Serpentine, and the drags are not near, can it be said that the absence of the drags was the cause of his drowning? It was but an intervening cause, the absence of a saving power, which had it been exerted would have saved the ship. But still it leaves the proximate or immediate cause of the loss a continuation of the first original meritorious cause, namely, steering the vessel straight on

to the rock which caused the loss, and that seems to me to [\* 180] be plainly a loss by perils \* of the sea. The only time that

I ever entertained a doubt about it was when listening to one of the learned counsel for the defendants, Mr. Mellish. He said, suppose there had been a contract between the owner of the lighthouse and the present plaintiff to keep the light burning, and it had been proved that the light was not kept burning in accord-

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ance with the contract, and that in consequence the plaintiff in the darkness of the night was thrown on the rocks. Can any one say there would not have been a cause of action? No doubt there would. But then that is necessarily and distinctly a contract against the indirect and remote damage occasioned by the absence of this extrinsic saving power just as much as if it had been expressed in words. For a vessel cannot be lost by the absence of the light, except as an intervening cause of this nature; and in a contract of that kind a loss by subsequent sea-damage would have been included. It seems to me, therefore, that that hypothesis does not oppose any real difficulty. I must say that from the beginning to the end of the argument the case has presented itself to me on this part of it in the same light.

When I come to the second question, was the loss a partial loss or a total loss of the cargo, at one time, undoubtedly, I felt some difficulty. There can be no doubt that when the vessel went aground and was totally lost, with respect to the cargo it was not totally lost. The general rule as to the total loss of a cargo is, that a cargo is totally lost when it no longer exists in specie, but has become something else, either by the progress of decomposition or from some other source, when, as has been strongly put in some of the cases, it only exists in the shape of a nuisance. Or it is lost when it is inaccessible and cannot be got at. It makes no difference whether it is on the top of a rock, or at the bottom of the ocean,—in either of those cases there is a total loss of the cargo. That is not so here. The cargo after the vessel was on shore existed in specie. It was accessible, and, as my learned Brothers have observed, the salvors here, who have been called wreckers, and whose name has tended to confuse this case, would have assisted, and would, had they been uninterrupted, have saved 1120 bags. My Brother WILLES and my Lord also have already pointed out the distinction between this case and *Hahn v. Corbet*. Since I had the pleasure of hearing Mr. Mellish I have had an opportunity of looking at that case, and I have looked into it very carefully, and undoubtedly, whatever were the facts of that case, the CHIEF JUSTICE puts it distinctly upon the question, When were the goods lost? They were lost when the ship was totally lost; no other ship was near; there was no land near; it was just as if they had been cast on a rock, and they had been completely out of reach. The case, therefore, of *Hahn v. Corbet* opposes no diffi-

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culty. In that case the goods, according to the strictest definition of a total loss, or a partial loss as applicable to goods, had been totally lost. Here there was originally no total loss of the goods, but only a partial loss. Now there was undoubtedly afterwards, except as to 120 bags, a total loss of the goods, but with respect to a portion of the loss it was not by perils of the sea. I will not enlarge upon this point, for I could only repeat what has been said by my learned Brethren. The result seems to me to be clear, that the 1000 bags were within the exception, and that the rest were lost by the perils of the sea.

KEATING, J.—I am quite of the same opinion. The principal question, no doubt, as it has been put by the learned counsel for the defendants, is, What is the meaning and construction of these words used in the warranty, “ free from all consequences of hostilities, riots, or commotion”?—and for the reasons that have been given, it seems to me that the intention of the parties was by that exception to warrant the freedom from all consequences of hostilities, riots, or commotion as a cause of the loss which occurred. That being so, it is admitted on all hands that the immediate cause of loss was the perils of the sea. Therefore, if the warranty is to be read in the way that I have stated, there can be no doubt that, according to the universal construction of instruments of marine insurance, the cause intended must be taken to be the immediate or proximate cause of the loss; that is, the perils of the sea, and not the putting out the light at Cape Hatteras. I also

agree with the rest of the Court, that the loss here ultimately is a partial loss. Mr. Mellish \* well expressed it

when he said that as long as the coffee remained, as coffee, under the control of the captain and crew, and was capable of being saved, there could be no total loss. Taking the whole of that together, that seems to be correct; but as bearing on this case the observation arises that as to 5380 bags, from the moment that the ship struck on the rock the coffee was no longer within the control of the captain and crew, with any capacity to be saved, or capable of being saved,—it was then and there lost presumably quite as much so as it was after it was actually lost. As to the 1000 bags which might have been saved, I have no doubt that their loss was as clearly occasioned by the consequence of hostilities as that the remainder, the 5380, were lost by the perils of the sea. That being so, I come to the same conclusion that the rest of the Court

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have arrived at, that the verdict should be for the plaintiff as to the 5380 bags, and as to the residue for the defendants.

*Rule absolute to enter the verdict accordingly.*

#### ENGLISH NOTES.

There is usually, after the enumeration of the perils insured against, a sweeping clause, “and of all other perils, losses, and misfortunes.” This clause has been construed on what is called the *eiusdem generis* principle, so as to cover other cases of marine damage of the like kind with those enumerated. An early case in which the clause was given effect to is *Cullen v. Butler* (1816), 5 M. & S. 461, 17 R. R. 400, where an English ship having been sunk by another English ship firing upon her under a mistake, Lord ELLENBOROUGH held that if this was not a loss by perils of the seas, it came within the clause, “all other perils,” &c. Other cases are *Butler v. Wildman* (1820), 3 B. & Ald. 398, 22 R. R. 435, where specie was thrown overboard to avoid immediate capture; *Phillips v. Barber* (1821), 5 B. & Ald. 161, 24 R. R. 317, where a ship was blown over on her side in a graving-dock; *Devaux v. J'Anson* (1839), 5 Bing. N. C. 519, where a ship, being in a dry-dock, was damaged by the preparations for getting her afloat; *Davidson v. Burnand* (1868), L. R. 4 C. P. 117, 38 L. J. C. P. 73, 19 L. T. 782, 17 W. R. 121, where the injury was by water getting into the vessel by apertures left open by the negligence of the crew; *West India and Panama Telegraph Co. v. Home and Colonial Marine Insurance Co.* (C. A. 1880), 6 Q. B. D. 51, 50 L. J. Q. B. 41, 43 L. T. 420, 29 W. R. 92, where a ship was wrecked by the bursting of her boiler. The ship did not sink, but was rendered unseaworthy by the explosion; and she was, by great exertion, towed into shallow water to avoid going down altogether.

These cases are all well considered in the judgments of the House of Lords in *Thames and Mersey Marine Insurance Co. v. Hamilton* (H. L. 1887), 12 App. Cas. 484, 56 L. J. Q. B. 626, 57 L. T. 695, 36 W. R. 337, where the claim was for damage to a donkey-engine on board ship, by the bursting of the air-chamber of the pump, caused by the closing of a valve which should have been opened when the engine was set to work. The decision in *Devaux v. J'Anson*, *supra*, and *West India and Panama Telegraph Co. v. Home and Colonial Marine Insurance Co.*, *supra*, are much questioned by the learned Lords who advised the House; and they held that the cause of damage, which could not be distinguished in principle from what occurred in those cases, was not *eiusdem generis* with the perils insured against, and was not covered by the policy.

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After this decision of the House of Lords, it would seem that the actual decision in some of the earlier cases, *e. g. Cullen v. Butler* and *Davidson v. Burnand*, could have been more safely rested upon the words “perils of the seas,” as the proximate cause, than upon the words “other perils,” &c. In *Davidson v. Burnand, supra*, indeed, the Judges seemed inclined to the view that the proximate cause was a peril of the seas; and Lord HERSCHELL, in *Wilson v. Owners of Cargo Ex Xantho* (1887), 12 App. Cas. 503, 56 L. J. P. D. & A. 116, 57 L. T. 701, 36 W. R. 353, observes that the opinion of the Court in *Cullen v. Butler, supra*, to the effect that the loss there was not by a “peril of the sea,” was a solecism. The question in *Wilson v. Owners of Cargo Ex Xantho, supra*, was whether the foundering of a ship through a collision at sea was a danger or accident of the seas within the meaning of the ordinary exception in a bill of lading. The House of Lords held that it was; and this is of course a final authority as to the meaning of the same term in a policy of marine insurance. See also on this point *De Vuax v. Salvador*, No. 76, p. 305, *post*.

The following are cases in which the cause of the damage claimed has been held too remote: In *Powell v. Gudgeon* (1816), 5 M. & S. 431, 17 R. R. 385, on a policy on goods, where the ship, being disabled by the perils of the sea, was obliged to put into port, and the master from necessity, as alleged, sold part of the goods to pay for repairs, it was held that the peril of the sea as a cause of loss was too remote. This was followed in a precisely similar case, *Sarquy v. Hobson* (1823, 1827). 2 B. & C. 7, 4 Bing. 131, 26 R. R. 251, where the judgment of the King’s Bench was affirmed in the Exchequer Chamber. The same principle was again applied in *Greer v. Poole* (1880), 5 Q. B. D. 272, 49 L. J. Q. B. 463, 42 L. T. 687, 28 W. R. 582.

But where, in consequence of the wreck of the ship, a sum of gold carried by her was sent ashore, and placed in the hands of the foreign authorities, and according to the law of the country it had to contribute to the salvage of the cargo, this was held a loss by perils of the seas. *Dent v. Smith* (1869), L. R. 4 Q. B. 414, 38 L. J. Q. B. 144, 20 L. T. 868, 17 W. R. 646. And where a loss by stranding has occurred in consequence of negligent navigation, it was held nevertheless to have been proximately caused by “perils of the sea.” *Trinder v. North Queensland Ins. Co.* (1897), 66 L. J. Q. B. 802.

A plate-glass insurance policy excepted “fire, breakage during removal, alteration or repair of premises.” It was held that breakage by the pressure of a crowd assembled to look at a fire next door was not excepted. *Marsden v. City and County Insurance Co.* (1865), L. R. 1 C. P. 232, 35 L. J. C. P. 60, 13 L. T. 465, 14 W. R. 106.

In the case of *Pugh v. London, Brighton, and South Coast Rail-*

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*way Co.* (C. A. 1896), 2 Q. B. 248, 65 L. J. Q. B. 521, 74 L. T. 724, 44 W. R. 627, the Court of Appeal had, under peculiar circumstances, to consider the effect of an insurance against “accident occurring (to an employee of the company) in the discharge of his duty.” This was held to cover the effects of a shock to the nerves sustained by a signal-man on duty.

## AMERICAN NOTES.

This case is cited in 1 Parsons on Marine Insurance, p. 556, and 2 Beach on Insurance, sect. 896, and in 2 Sedgwick on Damages, p. 403 (but the decision incorrectly stated), and in 1 Sutherland on Damages, pp. 33, 42, 3 ibid. 63, and in 14 Am. & Eng. Enc. of Law, p. 380.

A few analogies from the enormous mass of adjudications involving this maxim will be sufficient. In *Scripture v. Lowell M. F. Ins. Co.*, 10 Cushing (Mass.), 356, it was held that insurance against loss or damage by fire covers a loss arising in part from explosion, and in part from combustion, of gunpowder on the premises. In *Lynn Gas & E. Co. v. Meriden F. Ins. Co.*, 158 Massachusetts, 570, it was held that insurance on electrical fixtures covered loss by fire in a remote part of the building, causing a short-circuit and breaking the machinery by the strain. Citing the principal case. So of a fire caused by collision of vessels, the vessel sinking with the goods insured before they were touched by the fire, the Court holding that if the goods could have been saved but for the fire, the fire was the immediate cause of loss. *New York & B. D. E. Co. v. Traders' & M. Ins. Co.*, 132 Mass. 377; 42 Am. Rep. 440. Citing the principal case, and *Insurance Co. v. Transp. Co.*, 12 Wallace (U. S. Supr. Ct.), 194, an exactly similar case, where the Court said that the finding of fact that the sinking of the vessel was the natural and necessary result of the fire alone, was controlling, and although the water contributed, “the effects of the fire were necessary to give it additional efficacy.” In *Waters v. Merchants' L. Ins. Co.*, 11 Peters (U. S. Supr. Ct.), 213, a fire caused an explosion of gunpowder, and this fire was held the proximate cause of the loss, and having been caused by a barratrous purpose, was excepted. But the Court, after a very exhaustive review, hold that a fire caused by negligence or unskilfulness of the master or crew is within the policy. This question was declared never to have been before directly presented to any English or American Court, *i. e.* on a marine policy with risk of fire taken but risk of barratry excepted, and a loss by negligence. The Court cited *Bush v. Royal Ex. As. Co.*, 2 B. & Ald. 73, and *Walker v. Maitland*, 5 B. & Ald. 173; and *Patapsco Ins. Co. v. Coulter*, 3 Peters, 222, a case of loss by fire and barratry not excepted.

In *St. John v. Am. M. F. & M. Ins. Co.*, 11 New York, 516, a fire policy excepted loss by explosion. An explosion threw down the building, and immediately fire broke out and caused a loss. Held, two Judges dissenting, that the insurer was not liable. So loss caused by an insured to another vessel by collision is not a peril of the sea insured against. *General M. Ins. Co. v. Sherwood*, 14 Howard (U. S. Supr. Ct.), 351, a very learned examination. So in *Insurance Co. v. Tweed*, 7 Wallace (U. S. Supr. Ct.), 44, where a

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fire policy excepted explosion, an explosion occurred in another building, and threw down the former, and caused a fire therein: held, that there was no liability on the insurer. The principal case was cited on the argument. The Court said: "One of the most valuable *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause." "In the present case we think there is no such new cause." The same was held in *Trans. F. Ins. Co. v. Dorsey*, 56 Maryland, 70; 40 Am. Rep. 403, where explosion was excepted unless fire ensued, and the insured property, sulphuric acid, was in a house which was blown down by a storm, and in falling broke the chamber containing the acid and it was wasted. To precisely the same effect, *Briggs v. North A. & M. Ins. Co.*, 53 New York, 446. So in *United, &c. Ins. Co. v. Foote*, 22 Ohio State, 340; 10 Am. Rep. 735, where explosion was excepted, and an explosion set fire to insured liquors.

In *Insurance Co. v. Boon*, 95 United States, 117, a fire policy contained an exemption in case of loss by means of "invasion, insurrection, riot, or civil commotion, or of any military or usurped power." In the Civil War, a Confederate force attacked the city where the property was, and the Union commander, to prevent military stores from falling into their hands, fired the building containing them, and the fire spread through several adjacent buildings to that containing the insured property and destroyed it. No surrender or entry of the attacking force occurred until afterwards. Held, that the fire was excepted from the risk. (Three Justices dissenting.) Citing *Ins. Co. v. Tweed*, 7 Wallace (U. S. Supr. Ct.), 44; *Butler v. Wildman*, 3 B. & A. 398. In *Ins. Co. v. Express Co.*, 95 United States, 227, a fire policy on goods in transit excepted loss in case of collision except fire ensue. The Express Company had goods in transit, in a freight car, forming part of a railway train, which collided with a petroleum train, and instantly the petroleum train burst into flames, and these destroyed the express car and its contents. Held, that the loss was excepted.

Where a vessel was driven ashore during a detention, the peril of the sea was held the proximate cause of loss. *Bailey v. So. Car. Ins. Co.*, 3 Brevard (So. Car.), 354.

Where a vessel was warranted free from loss if not permitted entry in consequence of having negroes on board, anchored outside a port to await permission to enter, and was lost in a hurricane before such permission could be obtained, the hurricane was held the proximate cause of loss. *Dickey v. United Ins. Co.*, 11 Johnson (N. Y.), 358.

A loss occasioned by the burning of a bridge by the military authorities, to prevent the advance of an armed force of rebels, is not a "loss by fire occasioned by mobs or riots." *Harris v. York, &c. Ins. Co.*, 50 Penn. State, 341. This is put on the double ground that the outbreak was not the proximate cause, and that it was too serious to be deemed a "riot" or a "mob."

Where goods were removed in good faith to save them from fire, the insurers were held liable for injury occasioned to them in such removal by water and smoke alone. *Case v. Hartford F. Ins. Co.*, 13 Illinois, 676. The policy required effort on the part of the insured to save his goods in case of

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fire, and the Court said: "Whatever loss or damage the plaintiff necessarily sustained by the removal of the property insured when the danger of its destruction by fire was so direct and immediate that a failure to have made the removal while he had the power would have been gross negligence on his part, he is entitled to recover in this action. The fire, in such circumstances, may in a just sense be regarded as the proximate cause of the loss." (Two Judges dissented.) The Court distinguish *Hillier v. Allegheny M. Ins. Co.*, 3 Penn. State, 470; 45 Am. Dec. 656, where the contrary was held in a case of removal where there was no fire nearer than the fourth house from that of the plaintiff, and there was no injury by fire to the goods. Both these last two cases are cited in *White v. Republic F. Ins. Co.*, 57 Maine, 91; 2 Am. Rep. 22, and the doctrine of the former adopted where neither the building in question nor the block in which it was situated was seriously ignited, but a great conflagration was raging directly across the street, with a heavy wind blowing the sparks and flame on to the plaintiff's premises. The Court said: "We think the liability of the underwriters, in these and similar cases, depends very much upon the imminence of the peril and the reasonableness of the means used to effect the removal. . . . The necessity for removal need not be actual, that is, the building may not have been actually burned, since this may have been prevented by a change in the direction or force of the wind, the more skilful or efficient management of the fire-engines, or the sudden happening of a shower, or a like unforeseen event. But the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be the violation of a manifest moral duty; the damage and expense of removal too must be such as might reasonably be incurred under the circumstances of the occasion." May approves the last case as stating "the better doctrine" (2 Insurance, sect. 40!); and such is the doctrine of *Balestracci v. Firemen's Ins. Co.*, 34 Louisiana Annual, 844.

Even loss by theft in the process of removal is held to be a proximate consequence of the fire. *Tilton v. Hamilton F. Ins. Co.*, 1 Bosworth (N. Y. Super. Ct.), 367, preferring the *Case* to the *Hillier* case, above. DUER, Ch. J., gives a very learned examination of the subject of consequential losses, citing many English marine cases. (One Judge dissented.) This decision was followed in *Independent M. Ins. Co. v. Agnew*, 34 Penn. State, 93 (citing also the *Case* case), and the same doctrine is recognized *obiter* in *Webb & Co. v. Protection, &c. Ins. Co.*, 14 Missouri, 1 (the policy excepted theft).

In *McCargo v. New O. Ins. Co.*, 10 Robinson (Louisiana), 202; 43 Am. Dec. 180, slaves were insured from Norfolk to New Orleans, against all risks, and chiefly against that of foreign interference, but with exception of elopement, insurrection, and natural death. On the voyage, slaves other than those of the plaintiff arose and seized the vessel and carried her into a British port, where the slaves were liberated by the British government, and the crew did not regain possession of the vessel until after this took place. It was held that the insurrection, and not the act of government, was the proximate cause.

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No. 75.—*Lawrence v. Aberdein*, 5 Barn. & Ald. 107.—Rule.

When goods are insured against fire, but loss by theft is excepted, the insurer is not liable for loss by theft after the removal of the goods to save them from fire. *Webb v. Prot. Ins. Co.*, 14 Missouri, 3.

In *Rice v. Homer*, 12 Massachusetts, 229, a vessel suffered damage by perils of the sea to three-fourths of her value, and one-third of her cargo was thrown overboard to save the rest and the lives of the crew. In consequence of this misfortune she was forced into a hostile port, and was confiscated there. Held, a loss by capture.

A valuable collection of American cases (citing the principal case) is in 14 Am. & Eng. Enc. of Law, p. 380 *et seq.*

No. 75.—LAWRENCE *v.* ABERDEIN.

(K. B. 1821.)

## RULE.

WHERE a policy is effected on living animals, the death of the animals caused by the agitation of the ship in a storm is a loss by perils of the sea; and although the policy contains the words "warranted free from mortality," this does not create an exception, the words being construed as merely protecting the underwriters against death from natural causes.

**Lawrence *v.* Aberdein.**

5 Barn. &amp; Ald. 107-117 (24 R. R. 299).

*Insurance. — Living Animals. — Peril of the Seas. — Causa proxima.*

[107] A policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured. Held, that this was a loss by a peril of the sea, for which the underwriters were liable.

Assumpsit upon a policy of insurance. The declaration stated a total loss of the animals insured, by perils of the sea, on the voyage. Plea, general issue. At the trial, before BEST, J., at the London sittings after Trinity Term, 1820, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case.

## No. 75.—Lawrence v. Aberdein, 5 Barn. &amp; Ald. 107, 108.

The policy was effected on the 30th December, 1819. The voyage insured was at and from Cork to Barbadoes and St. Vincents; and at the foot of the policy the insurance was declared to be on thirty mules, ten asses, and thirty oxen, warranted free of mortality and jettison. On the 17th January, 1820, the ship sailed with the animals insured, properly stowed on board, on the voyage insured. On the 19th of the same month a violent storm arose, which caused the ship to labour and pitch. This lasted, without intermission, until the 30th of the same month, when, for the preservation of the ship and cargo, and on account of the damage which the ship had sustained from the violence of the storm, the ship put into Mount's Bay, in Cornwall, in order to refit. On the first day of the storm, from the violent pitching and rolling of the ship, occasioned by the storm and consequent agitation of the sea, two of the mules, one of the oxen, and five of the asses were killed; the remainder of the animals, from the same causes and perils of the sea, on that and the following days, until the 30th of January, received such violent and severe bruises, lacerations, and injuries, that all of them \* died in consequence thereof, before the ship sailed again in prosecution of her voyage from Mount's Bay, which she did on the 14th February, 1820, excepting six mules and one ass, one of which six mules afterwards died from the same cause before the arrival of the ship at St. Vincents. The ship arrived at St. Vincents, with the remaining five mules and one ass, on the 24th March, and delivered the rest of her cargo in safety. The question for the opinion of the Court was, whether the plaintiff was entitled to recover for the loss of all, or any, and which of the animals insured ?

F. Pollock for the plaintiff.—The underwriters are not exempted from the loss that has happened by the words of the special exception, "warranted free from mortality." These words were introduced into the policy by the underwriters, and must therefore be taken most strongly against them. The word "mortality" signifies death arising from natural causes. Here, the death of the animals arose directly from the violence of the tempest, and not from natural causes. The loss did not, therefore, arise from mortality, if that word be understood in its ordinary and popular meaning. Some effect will be given to the exception by construing the word in that sense; for the underwriters will thereby

No. 75.—**Lawrence v. Aberdeen, 5 Barn. & Ald. 108–110.**

be exempted from one species of loss for which they might otherwise be responsible, viz. in the event of the death of the animals by seasickness in a storm. For such a loss the underwriters would be answerable under a common policy. But they would be exempted by the special exception.

[\* 109] \* *Campbell, contra.* — Some effect must be given to the words of the exception, so as to extend to the underwriters a protection against some species of loss to which they would have been liable, if those words had not been introduced into the policy. Now they would not have been liable for any loss arising from the natural death of animals, but they would have been liable if they had been drowned in a tempest or killed in battle. Pothier, *Traité du Contrat d'Assurance*, c. 1, s. 2, art. 2, s. 3, and Valin, *Ordonnances de la Marine*, liv. 3, tit. 6, art. 11. Here the animals died in consequence of the injury they received during the storm, and the underwriters, therefore, would have been liable for this loss under a policy in the common form. The exception, therefore, was introduced for the purpose of exempting them from all losses whatever, arising from the vitality of the subject matter insured, or, in other words, to reduce the risk to the same level as if the subject-matter insured was inanimate goods. If that had been the case here the cargo might have received little or no injury. If the words “free from mortality” be construed only to protect the underwriters against losses arising from death from natural causes, no effect whatever will be given to the exception; for, in such a case, the underwriters would not have been liable under a policy in the common form. The true meaning of the exception is, that the underwriters are to be liable for all the risks to which they would have been subject if they had insured inanimate goods. By this construction they will still be liable for losses by capture by enemies or pirates, or barratry of the master or mariners.

[\* 110] \* *ABBOTT, Ch. J.* — I am of opinion that the underwriters are answerable for this loss. The insurance was on living cattle, which, in the course of the voyage, have been killed by the rolling of the ship in a violent tempest. They have been killed, therefore, by a peril of the sea. Under the general terms of the policy the underwriters would be answerable. It lies on them, therefore, to show that there is a special exception in this policy applicable to the present case, in order to relieve them from

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the effect of their general liability. The expression used in the policy is “free from mortality.” Now the word “mortality,” in its ordinary sense, never means violent death, but death arising from natural causes. There may, however, indeed, be a remote cause, which may sometimes superinduce a natural cause. In *Tatham v. Hodgson*, 6 T. R. 656, the want of provisions was the immediate cause of the death of the slaves; the remote cause was the circumstance of the ship having been driven out of her course by the perils of the sea, in consequence of which the provisions, which otherwise would have been sufficient for the voyage, were exhausted. There was not any exception in the policy in that case. But the statute of the 34 Geo. III., c. 80, s. 10, had enacted “that no loss or damage should be recoverable on account of the mortality of slaves, by natural death or ill treatment, or against loss by throwing overboard of slaves, on any account whatsoever.” A question was made, whether the death of the slaves so arising, indirectly and remotely from the peril of the sea, was not one for which the underwriters were liable; and the Court held that they were not liable, because it was a loss arising by

\* natural death; and if the ship, in this case, had been [\*111] driven out of her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and, consequently, the means of sustaining the life of the animals insured, I think that the words “warranted free from mortality,” introduced into this policy, would have protected the underwriters from that loss for which they otherwise would have been liable, as for a loss arising from the perils of the sea. And if there be any one case in which effect can be given to those words, understanding them in their ordinary and popular sense, they ought not to be extended beyond that sense. There is very great difficulty, in construing these words, to give a protection to the underwriters against all losses arising from the vitality of the animals. Suppose, for example, a valuable horse, by the motion of a vessel in a storm, were to have his legs broken, but to arrive alive at St. Vincents, the animal would be of no use; the underwriter would be liable for that loss; but if the animal were actually killed, he would not be liable at all. It could hardly be the intention of the underwriter that he should be liable in one of these cases and not in the other. If the construction I have put upon this very ambiguous phrase is not the sense in which it

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has been generally understood at Lloyd's Coffee House, it will be very easy to introduce into policies other words which shall more clearly express the meaning of the parties. In this case, therefore, there must be judgment for the plaintiff.

BAYLEY, J.—My mind has not been free from doubt during the discussion of this subject; but I am now of opinion [\*112] that the assured is entitled to recover. Under \*a policy in the common form, the assured would have been entitled to recover, either in case of the total destruction of the animals, or for any less injury, provided it was occasioned by any of the perils insured against. The words, "warranted free from mortality," are introduced into this policy by the underwriter for his benefit. It is his duty, therefore, to take care to frame his exception in words sufficiently large and extensive to meet all those descriptions of loss against which he intends to protect himself. The word "mortality" may, under certain circumstances, include every description of death, every termination of life to which mortals are subject. It applies generally, however, to that description of death which is not occasioned by violent means. If a great number of the crew, or of animals shipped on board a ship, were killed in the course of an engagement with an enemy, it would not be correct to say that there had been a great mortality among the crew, or among the animals. If, on the other hand, they had come to their death by any natural cause, the term "mortality" would be properly applied to express the cause of such death. If, in this case, the animals insured had died from seasickness, occasioned by the agitation of the ship, or in consequence of any other disease, contracted in the course of an unusually protracted voyage, the term "mortality" might apply to that description of natural death, so superinduced by the voyage. Under a common policy, if the declaration stated that the ship had met with tempestuous weather, and that the animals thereby became disordered, diseased, and died, and it be proved that their death was imputable to the agitation of the ship, occasioned by the tempestuous weather, that would be a loss [\*113] by a peril of the sea for \*which the underwriters would be liable. The exception introduced into this policy would, in my opinion, protect them from such a loss. The word "mortality" here used may, therefore, receive a construction which will afford some protection to the underwriter, without

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extending it beyond its ordinary and popular sense. If we were to hold that the exception protected the underwriter from every loss to which the property was subject, in consequence of the subject-matter insured being alive instead of dead, this absurd consequence would follow, that if by the violent agitation of the sea the animals had their legs broken, and thereby became of no value to the owner, but arrived alive at St. Vincents, the underwriter would be responsible. Whereas, if they had died during the course of the voyage, he would not be liable at all. The circumstance of these words of the exception not being calculated to protect the underwriter from any loss, in the event of the animals receiving any injury short of death, seems to me to show that they were not intended to exempt them from a loss by the actual death arising immediately from a peril of the sea. I think that the words used in this exception will protect the underwriter in cases where the death of the animal arises from natural causes remotely produced by some of the perils insured against; but that they will not protect him where such death arises directly from any of the perils insured against. For these reasons I am of opinion that there must be judgment for the plaintiff.

HOLROYD, J.—I am of the same opinion. Although death may have been the immediate cause of the loss, and may have made the actual loss to the assured \* greater than it otherwise would have been, still, as the injury to the animals which occasioned their death was caused directly by the violence of the storm, I am of opinion that this is to be considered as a loss by the perils of the sea. It consequently falls within the risks enumerated in the policy; and it seems to me that it is not excepted out of those perils by the words “warranted free from mortality and jettison.” Independently of those words, the underwriters would undoubtedly have been liable as for a loss arising from a peril of the sea. Those words were the language of the underwriters, and were introduced by them to protect themselves from a particular species of loss. By the terms of the policy they insured against the perils of the sea, &c., and all other losses and misfortunes that should come to the hurt, detriment, and damage of the subject-matter insured. Now, the exception must be considered as ingrafted upon these general words in the policy, and the whole should be read together as one sentence; and then it would stand thus: that the underwriters will be liable for losses

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by perils of the seas, and all other losses except losses by mortality and jettison. It seems to me, that as the injury which immediately preceded and caused the death of the animals proceeded directly from the violence of the storm, the loss is to be considered a loss by the perils of the sea. Death may or may not have increased the amount of the actual loss to the assured. With respect to the mules and asses, the entire loss arose from the perils of the sea, and was neither increased nor diminished by their death. For, after receiving a mortal wound, they became

of no value to the owner, and death, consequently, did [\*115] not in any degree \* increase the loss. The case might be

different with respect to the oxen; if they were killed after receiving an injury, their flesh might be of some value as food, and, consequently, their death may have increased the loss in some degree. But still, as the previous injury was occasioned by the perils of the sea, whether the death of the animal did or did not increase the amount of the actual injury to the owner, I am of opinion that it must be considered a loss by the perils of the sea. The circumstance of the parties having inserted in the exception the word "jettison" satisfies me that they did not contemplate the case of violent death. For, although it is possible that the animals thrown overboard might, under favourable circumstances, reach the shore and survive, yet I think that the term usually denotes the throwing overboard in a storm, when there would be little probability of animals surviving; and that it must, therefore, mean a jettison whence death ensues. Now, if the term "mortality" were intended to protect the underwriter in every case of the animals meeting with a violent death, the introduction of the word "jettison" would be superfluous, as that species of loss would be covered by the word "mortality." Besides, this absurd consequence would follow: if we were to give to the words used in the exception the construction contended for by the defendant, that where the violence of the wind and waves was so great as to cause the death of the animals during the voyage, the underwriters would not be liable at all; but where the violence of the wind and waves was only such as to cause some injury to the animals, short of death, then the underwriters would be responsible. For these reasons, I am of opinion that the word

"mortality," in this policy, must be understood in its [\*116] ordinary \* and popular sense, as importing death arising

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from natural and not from violent causes. And that being so, there must be judgment for the plaintiff.

BEST, J.—I am of the same opinion. At the time when this policy was effected, this country was at peace with all the world, and there was not any probability of the vessel being captured by enemies. Capture by pirates on the voyage insured was equally improbable, and a loss by barratry was not very likely to happen. If the underwriters are not liable for the loss in question, they can hardly be liable in any case, for there is not any other species of loss arising from the destruction of the animals, of which death may not be considered the immediate cause. If the ship was even sunk or burned, death would be the immediate cause of the destruction of the animals, and consequently, according to the construction contended for, such a case would fall within the exception as a loss by mortality. The exception is introduced into the policy by the underwriters. If they had intended to exonerate themselves in every case of death occasioned by a peril of the sea, they should have used words apt and proper to express that intention. They might have stipulated that they would not be liable for the death of the animals unless the ship were stranded or lost, and then they would not have been liable for the loss that has occurred in this case. They have only stipulated that they will not be liable for loss by mortality. That word, in its ordinary and popular sense, signifies death arising from natural causes, and not from violence. I think, therefore, that the underwriters must be taken to have intended to exempt themselves, by this exception, from that species of loss which occurred \* in *Tatham v. Hodgson*, viz. a loss of which death was the proximate cause, and the perils of the sea the remote cause. Here the injury done to the animals arose directly and immediately from the violence of the tempest, or, in other words, from the perils of the sea. For these reasons I am of opinion that the plaintiff is entitled to the judgment of the Court. *Judgment for the plaintiff.*

## ENGLISH NOTES.

The above decision was followed in *Gabay v. Lloyd* (1825), 3 B. & C. 793, 27 R. R. 486. The case was on all-fours with the above, except that the ultimate, and in one sense the proximate, cause of death was that the animals injured each other by kicking. This was held not sufficient to distinguish the case from *Lawrence v. Aberdein*. Another point made was that by usage at Lloyd's, where the policy was made,

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underwriters were understood not to be liable under the clause in question when the vessel arrived safe. But the Court disregarded this, as the usage in question was not found to be a general usage, nor was it found that the plaintiff was cognisant of it.

These cases were distinguished in *Taylor v. Dunbar* (1869), L. R. 4 C. P. 206, 38 L. J. C. P. 178, 17 W. R. 382, where perishable goods insured by an ordinary policy perished by the natural consequence of the voyage being prolonged owing to bad weather; and it was held that the loss was not within the perils insured against. BRETT, J., said: “Damage to goods by delay, even if the delay is caused by tempest, is not a loss by the perils insured against; in no case has it been held that it is; and if the parties so intended, they could easily put it in the policy.” This decision was followed by MATHEW, J., in *Pink v. Fleming* (1890), 25 Q. B. D. 396, 59 L. J. Q. B. 151.

## AMERICAN NOTES.

The principal case is cited in 1 Parsons on Marine Insurance, p. 623, without any analogous American cases.

Counsel cited this case in *Snowden v. Guion*, 101 New York, 458, and the Court held that in an insurance on cattle at sea, the phrase, “by a sea,” covered loss occasioned by the motion of the ship struggling with a dangerous sea and dashing the animals against one another between decks. In *Coit v. Smith*, 3 Johnson Cases (N. Y.), 16, the insurance was on horses, against all risks, including death, from any cause, until safely landed. By the violence of the sea, a horse was thrown down and bruised; in consequence he refused to eat, and died in three days after landing. Held, that the insurer was liable. KENT, J., cited *Lockyer v. Offley*, 1 T. R. 252, 1 R. R. 194, and said the horse “received a death wound during the voyage,” and “the subsequent death of the horse is to be put wholly out of view.”

No. 76.—*DE VAUX v. SALVADOR.*

(1836.)

## RULE.

THE damage directly and physically done to a ship by a collision is a loss to the owner of that ship by a peril of the sea; but the loss caused to the owner by having to contribute to the compensation for a greater damage to the colliding ship is not, unless expressly provided for in the policy, a loss within the perils insured against.

**De Vaux v. Salvador.**

4 Adol. &amp; El. 420—432 (s. c. 6 N. &amp; M. 713; 1 H. &amp; W. 751).

*Insurance. — Damage by Collision. — Disability incurred to Colliding Ship.*

Insurance on a ship, *V.*, with the usual warranty as to average. The [420] ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship *V.* on the settlement had to pay a balance to the other ship. *Held*, not to be a loss to which the underwriters were liable.

*Held*, also, that the expenses of the wages and provisions of the crew of the *V.*, during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss.

Assumpsit on a policy of insurance for time on the ship *La Valeur*. The declaration claimed for general average, and for an average loss; the damage was laid to have been occasioned by perils of the sea. The policy contained the usual warranty, free from average under three pounds per cent, unless general, or the ship be stranded. The defendant, as to the claim of particular average, pleaded that the ship did \* not sustain [\* 421] an average loss or damage to the amount of 3 per cent, on which plea issue was joined. On the trial before Lord DENMAN, Ch. J., at the London sittings after last term, it appeared that the *La Valeur*, being in the Hoogly River, during the time covered by the policy, came into collision with a steam vessel called the *Forbes*, and that considerable damage was done to each vessel. The owner of the *Forbes* claimed a compensation from the *La Valeur*, and threatened to detain her, and to proceed in the Court of Admiralty at Calcutta; and, upon the claim being referred to arbitration, it was awarded that each ship should bear half the joint expenses of the two. Upon the settlement the *La Valeur* had to pay a balance to the *Forbes*. The *La Valeur* was detained by the necessity of repairing certain damage done to herself by perils of sea; and during the time of detention a sum of money was expended in the additional wages of the crew and provisions for them. If either this sum of money or the balance paid to the *Forbes* could be considered a particular average, then there was, on the whole, an average loss of 3 per cent, but not otherwise. The LORD CHIEF JUSTICE was of opinion that neither of these

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items could be taken into the account of particular average; and a verdict was found for the defendant on the above issue.

Maule now<sup>1</sup> moved for a rule to show cause why a verdict should not be entered for the plaintiff for such sum as the Court should direct, or why a new trial should not be had. It [\*422] is clear that the aggregate \* of several partial losses may make up the £3 per cent. *Blackett v. The Royal Exchange Company*, 2 Cr. & J. 244, 2 Tyr. 266 (p. 179, *ante*). Here the £3 per cent will be made up if either of two items be allowed. First, the underwriters are liable for the sum paid to the *Forbes*. The words in the policy are, “all other perils, losses, and misfortunes that have or shall come, to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof.” There is, indeed, no English decision precisely on the point; but there seems to be as good reason for underwriters making good such loss as a loss sustained from pirates. [LITTLEDALE, J. That loss is particularised.] But it would clearly be the subject of indemnity, though not particularised. A general average comes within the insurance only from the general words. The expression “free of average, under three pounds per cent, unless general,” shows this; for general average is specified as an exception from the exception: it must therefore be included in the subject-matter from which the main exception is made, that is, in the perils insured against. But among these perils there is no specific mention of general average: the general words therefore cover that, and the same words must also be sufficient to cover any loss by an accident like that in question. The principle is, that the underwriter makes good all that, by means of the peril, the owner is bound to pay: and here he was, in fact, as much bound to pay as the owner of goods is bound to pay harbour duties; for the owners of the *Forbes* had the legal means of enforcing the payment. It is

true that, by the English common law, each party bears [\*423] \* his own costs, in case of a collision, if there be fault in each; and it must certainly be assumed that there was fault on each side, in the present case. But the more generally understood law in maritime states is that, if there be fault in each party, each bears half of the aggregate loss of the two; and this may perhaps be considered the more reasonable principle. In the case of *The Woodrop-Sims*, 2 Dods. Adm. Rep. 85, this rule was

<sup>1</sup> Before Lord DENMAN, Ch. J., LITTLEDALE, WILLIAMS, and COLERIDGE, JJ.

## No. 76. — De Vaux v. Salvador. 4 Adol. &amp; El. 423, 424.

laid down by Sir William Scott, as follows: "This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *cis major*. In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." In the Laws of Oleron, 15 Vin. Abr. tit. Master of a Ship (A), 27, p. 340, \* it is said, "If a [\* 424] ship in her voyage, lying anywhere at anchor, be struck or grappled with another vessel under sail, for want of good steering, whereby the vessel at anchor is prejudiced, and the goods in her damnified; in such a case the whole damage is to be in common, and to be equally divided and appraised half by half. And the master and mariners of the vessel that struck, or grappled with the other, shall swear on the Holy Evangelists, that they did it not wittingly or wilfully; the reason of this judgment is that an old vessel might not purposely come in the way of a better; which she will hardly do, as long as the damage must be equally shared." In Emerigon, Vol. I. p. 413 (ed. 1827, ch. xii. s. 14), it is said: "Si l'abordage n'est pas arrivé par cas fortuit, et qu'il soit impossible de savoir par la faute de qui, c'est alors le cas de partager le différend, et de faire supporter la moitié du dommage à chacun des deux navires. Tel est le sens de l'art. 10; titre des avaries. 'En cas d'abordage de vaisseaux, est-il dit, le dommage sera payé également par les navires qui l'auront fait et souffert, soit en route, rade, ou au port.' " For which are cited Les Jugemens d'Oléron, art. 14; L'Ordonnance de Wisbuy, art. 26, 27, 50, & 70; and Le Droit Anséatique, tit. 10. The editor, M. Boulay-Paty,

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in the comparison, at the end of the section, with the modern code of commerce, says (p. 417) that the law is that, if there be doubt, in the case of collision, as to the cause, each vessel is to bear its part; and he goes on thus: “La loi considère donc comme les vraies causes du dommage la fortune de mer, la force majeure qui

a poussé les navires l'un sur l'autre; et dans ce cas, la [\* 425] portion qui \* incombe au navire assuré doit être à la charge des assureurs, qui, par la nature du contrat d'assurance, sont tenus de tous les accidens arrivés sur mer, quelque insolites, inconnus ou extraordinaires qu'ils soient.” (And see Boulay-Paty, Cours de Droit Commercial Maritime, Tit. X. s. 16, tom. 4, p. 16. That reasoning applies here; and it may be added that, the less an accident can be foreseen, the more properly is it the subject of insurance, since that which was foreseen would not be insurable. Pothier, in his *Traité du Contrat d'Assurance*, ch. i. sect. ii. art. 2, § 2, 49 (*Traités sur Différentes Matières de Droit Civil*, tom. 3me, p. 18, 2d ed., 1781), says, “L'assureur se charge par le contrat d'assurance, des risques de tous les cas fortuits qui peuvent survenir par force majeure durant le voyage, et causer à l'assuré une perte dans les choses assurées, ou par rapport auxdites choses.” If, then, the *La Valeur*, as was clearly the case, could not be released without this payment, the payment falls within that class of losses which the underwriters must make good.

Secondly, as to the wages and provisions of the crew for the time during which the ship was under necessary repair. These are incidental to the repairs, and, being so, must be governed by the same rule. It is a general principle (subject to some exceptions which may easily be explained) that, where underwriters are liable to indemnify for any part of a loss, they must indemnify for the whole. Now, in the case of any damage which is the subject of general contribution, the wages and other expenses of the crew during the time of repair, which are in the nature of accessories to the principal expense, that of repairing, must also

[\* 426] be the subject \* of general contribution. In Abbott on Shipping; Part III., ch. 8, s. 7, p. 350 (5th ed.), it is said, “But if a ship should necessarily go into an intermediate port for the purpose only of repairing such a damage as is in itself a proper object of general contribution, possibly the wages, &c., during the period of such a detention, may also be held to be general average, on the ground that the accessory should follow

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the nature of its principal." The author does not apply this to insurances, which are not the subject of his work; but the passage seems to warrant such an application of the doctrine, that the accessory is to follow its principal. Now, here, the underwriters were indisputably bound to make good the expense of the repairs: they must, therefore, bear the accessory expense. Suppose, in the case put in the extract just given, the owner of goods, who was liable to the general average, had insured these goods, the underwriters would have to make good the payment of the wages, &c. Why should the same principle not be applied, where the insurance is on the ship, to the share of general average which falls on the owner of the ship? And, if there be no cargo, and consequently no one to contribute to a general average, can that make any difference in the liability of the underwriters? Can it be contended that the principle holds if there be a single bale of goods on board, but ceases to be applicable if there be no cargo? When the damage is to the subject insured, that is a partial loss, to which the underwriter is liable; and it is immaterial to inquire whether it be a general average or not, the underwriter being liable to the assured in the whole (though, if it be a general average, he may claim contribution from those \* liable [\* 427] to contribute); so that, in such a case, as between the underwriter and the assured, particular and general average become identical. In *Fletcher v. Poole*, 1 Park, Ins. ch. 2, p. 89, 7th ed., it was held that the extraordinary wages and provisions expended during the detention of the ship could not be recovered on a policy on the ship. But that was a mere case of detention to refit: the plaintiff claimed only the wages and provisions expended during her repairs. It does not appear that the repairs were occasioned by anything but ordinary wear and tear, or by anything for which the underwriters were liable. The same remark applies to the cases of *Eden v. Poole*, 1 Park, Ins. ch. 2, p. 91, 7th ed., and *Robertson v. Ever*, 1 T. R. 127 (1 R. R. 164). In *Power v. Whitmore*, 4 M. & S. 141 (16 R. R. 416), the wages and provisions of the crew expended while the ship was in port repairing a damage occasioned by a tempest were held not to be the subject of general average; and, consequently, the plaintiff, whose insurance was on goods, could not recover against his underwriter money paid by him as a contribution to such expenses. That decision was on the ground that there had been no sacrifice of a

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part to preserve the whole, and, consequently, no general average to which the plaintiff was liable to contribute; reasoning which does not show that the underwriter on the ship would not be liable to pay the expenses in question, but rather that he would be; for there is no doubt that the principal damage to which the expenses in question were accessory, being a damage to the ship by the

perils of the sea, would be one to which he would be liable, [\*428] though the underwriter on goods (the defendant in *\*Power v. Whitmore*) would not, according to the doctrine laid

down in Abbott on Shipping, Part III. ch. 8, s. 7, p. 350 (5th ed.), that such expenses are not matter of general average, but "must fall on the ship alone." Whoever is liable to the damage sustained by the ship must therefore sustain such expenses. It follows that the underwriter on the ship, who is clearly liable to the damage which the ship sustains, must pay these expenses also. A stater of averages arranges the losses in three columns, headed respectively, "General," "Ship," "Owners;" and under "Ship" he sets down all to which the underwriters on the ship are liable. So BULLER, J., in *Eden v. Poole*, Park, Ins. ch. 2, p. 91, 7th ed., held the underwriters on the ship and goods not liable, because "the freight, and not the ship," was liable to the loss. In the last cited passage in Abbott, the author refers to the Code de Commerce, art. 403.<sup>1</sup> There the expenses of the wages and provisions of the crew, during the detention by a foreign power, or by the necessity for repairs, are classed together as particular averages; and the article is cited in the conference of the modern law with Emerigon (Vol. I. p. 619, ch. xii. s. 41, ed. 1827), by Boulay-Paty. The same author, in a work of his own, *Cours de Droit Commercial Maritime*, Vol. IV. p. 40, Tit.

[\*429] \*X. s. 16, says that, in case of the arrest or other detention of a vessel after departure (and in the passage just cited, arrest "par ordre d'une puissance" is placed in the same class with detention for the purposes of repair), the insurers must

<sup>1</sup> Tit. 11<sup>e</sup>, "Sont avaries particulières:—1<sup>o</sup> le dommage arrivé aux marchandises par leur vice propre, par la tempête, prise, naufrage ou échouement;—2<sup>o</sup> les frais faits pour les sauver;—3<sup>o</sup> la perte des câbles, amarres, voiles, mâts, cordages, causée par tempête ou autre accident de mer;—les dépenses résultant de toutes relâches occasionnées, soit par la

perte fortuite de ces objets, soit par le besoin d'avitaillement, soit par voie d'eau à réparer;—4<sup>o</sup> la nourriture et le loyer des matelots pendant la détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations qu'on est obligé d'y faire, si le navire est affrété au voyage."

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bear the loss resulting from the cost of provisions and wages of the crew. This is also the American law. See, however, Phillips's Treatise on the Law of Insurance, vol. i. ch. xvi. sec. 1, p. 370 (Boston, U. S., 1823). Some foreign authorities class such expenses as general average, on the same principle as that upon which expenses of going into port to preserve a ship are so classed: this is apparently an extension of the Rhodian law, by which a *jactus* was requisite. See Pardessus, *Cours de Droit Commercial*, tom. 2, part iv. tit. iv. ch. iv. sect. 1, § v. (740, and part iv. tit. v. ch. i. sect. ii. § i. (773).

*Cur. ad. vult.*

Lord DENMAN, Ch. J., in this term (January 30th) delivered the judgment of the Court.

This was a motion for a new trial in an action of assumpsit, tried before me at Guildhall, on the insurance of a ship, for loss by perils of the sea. The jury found a verdict according to my direction, excluding the expense for wages and provisions incurred from the time of her repairing damage sustained from a storm, and excluding also the sum of money which the owners had paid in consequence of some proceedings commenced in the Court of Admiralty at Calcutta, in consequence of an accidental collision with another vessel in the Hoogly River. The new trial was moved for on the ground that both these heads of damage ought to have been taken into account by the jury.

\* We think it clear, on authority, that the former item [\* 430] ought not to be allowed. As long ago as 1769, in *Fletcher v. Poole*, 1 Park, Ins. ch. ii. p. 89, 7th ed., the point was decided by Lord MANSFIELD at Nisi Prius. The doctrine has been cited in the text-books ever since that period, and is expressly recognized by BULLER, J., in *Robertson v. Ewer*, 1 T. R. 132 (1 R. R. 164). The facts of that case did not, indeed, require the doctrine, which is merely assumed in the argument of that learned Judge to illustrate his opinion on the case then before the Court. Mr. Maule therefore urged that the law rested on a single decision of Lord MANSFIELD'S at Nisi Prius; but when we consider the high authority of that great master of insurance law, — that that case was unquestioned, — that it received the sanction of so eminent a lawyer as Mr. Justice BULLER, who treats it as clear enough to lay the foundation of an argument from analogy, — when it is fully adopted in the works of distinguished writers on the subject,

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—and, above all, when we find no trace of even a claim being set up inconsistent with it for a period of near 70 years, though the facts must have afforded the opportunity many thousands of times, we think this point must be regarded as fully established, and that we should not be justified in casting any doubt upon it.

We would only further observe that the passage cited from Lord TENTERDEN's excellent work, Abbott on Shipping, 350, which speaks of these expenses as being in the nature of an accessory to a principal, is confined to the questions of contribution which

may exist between the owners and the freighters, and does [\*431] not in anywise relate to the demands \* which may be preferred against underwriters. It therefore furnishes no proof that he differed from the doctrine above alluded to. On the contrary, if he had intended to do so, he could hardly have failed to express his dissent in direct terms.

The second point appears to be entirely new, which circumstance is not so strong an argument against it as against the former claim, because the event is likely to have been of much less frequent occurrence. But, if we look for the principle on which *Fletcher v. Poole*, 1 Park, Ins., ch. ii. p. 89, 7th ed., was decided, it must obviously be that well-known maxim of our law, "In jure non remota causa sed proxima spectatur." "It were infinite" (says Bacon, Maxims of the Law, p. 35 of Law Tracts, 1737) "for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itse'f with the immediate cause, and judgeth of acts by that, without looking to any farther degree." Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel: and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has

done more damage than she has received, and is obliged to [\*432] pay the owners of the \* other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows

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out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against.

We think, therefore, that no rule ought to be granted.

*Rule refused.*

## ENGLISH NOTES.

This decision is cited by Lord BLACKBURN in *Inman Steamship Co. v. Bischoff* (H. L. 1883), 7 App. Cas. 670, 686, 52 L. J. Q. B. 169, 177, 47 L. T. 581, 31 W. R. 141, as an authority showing that an abatement by way of fine in a charter-party arising from circumstances occurring after the freight is earned cannot constitute a loss under a policy on “freight.”

One effect of the above decision of Lord DENMAN has been the adoption by shipowners of what is called a *running down clause*. The clause in the form usual at Lloyd’s contains an indemnity against any sums the assured shall “become liable to pay and shall pay . . . not exceeding the value of the ship.” It has been held, in accordance with a decision of the House of Lords on appeal from the Admiralty Court in the case of *The Khedive, The Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.* (H. L. 1882), 7 App. Cas. 795, 52 L. J. P. D. & A. 1, 47 L. T. 193, 31 W. R. 249, that there is only one liability in such a case; namely, for the excess (if any) of damages payable by the insured ship according to the Admiralty rule, now incorporated into the ordinary law by the Judicature Acts. *London Steamship Owners Insurance Association v. Grampian Steamship Co.* (C. A. 1890), 24 Q. B. D. 663, 59 L. J. Q. B. 549.

It has been held that the ordinary running down clause does not apply to damages payable to persons injured on board another ship, by the negligence of the master of the insured ship. *Taylor v. Dewar* (1864), 5 B. & S. 58, 33 L. J. Q. B. 141, 10 Jur. (N. S.) 361, 10 L. T. 267, 12 W. R. 579. This, however, is in apparent conflict with a decision of the Scotch Court of Session, *Coey v. Smith* (1860), 2nd series of Court of Session Cases, vol. 22, p. 955;—unless the slight difference of language in the two policies can support a distinction. In the Scotch case the language was: “In case the said ship shall come into collision with any other ship or vessel, and the assured shall, in consequence thereof, become liable to pay and shall pay any sum not exceeding the value of the said ship and her freight, by or in pursuance of the judgment of any

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court of law or equity." In the English case the clause was: "In case the vessel shall by accident or the negligence of the master run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay," &c. At all events, if such a liability is intended to be covered, it should be stated more explicitly.

It has been held that life-salvage, under s. 544 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), cannot be recovered from an underwriter under a Lloyd's policy in the usual form with the running down clause attached. *Nourse v. Liverpool Sailing Ship-owners Association* (C. A. 1896), 2 Q. B. 16, 65 L. J. Q. B. 507, 74 L. T. 543, 44 W. R. 500.

#### AMERICAN NOTES.

This interesting case is cited in 1 Parsons on Marine Insurance, p. 554, and in all the cases cited hereinafter.

That the insurer is liable for the whole loss, including what the owners of the insured vessel paid to the owners of the other, has been held and is still held in Massachusetts: *Nelson v. Suffolk Ins. Co.*, 8 Cushing, 477; 54 Am. Dec. 779, and notes, 787; *Walker v. Boston Ins. Co.*, 14 Gray, 288; *Blanchard v. Eq. Ins. Co.*, 12 Allen, 388; and early in the New York Supreme Court: *Matthews v. Howard Ins. Co.*, 13 Barbour, 234; and by STORY in the Federal Circuit Court for Massachusetts: *Hale v. Washington Ins. Co.*, 2 Story, 176; and in the same Court for New York: *Sherwood v. General Mut. Ins. Co.*, 1 Blatchford, 251; and in the Federal Supreme Court, *Peters v. Warren Ins. Co.*, 14 Peters, 111, STORY, J., said of the principal case: "This is the whole reasoning of the learned Judge upon the point; and with great respect, if the views already suggested are well founded, it is not supported by the analogies of the law, or by the principles generally applied to policies of insurance. The case of a penalty, put by the learned Judge, does not strike us with the same force that it does his Lordship. If any nation should be so regardless of the principles of natural justice as to declare that a vessel driven on shore by a storm should be forfeited because its revenue laws were thereby violated; it would then deserve consideration whether the underwriters would not be liable for the loss, as an inevitable incident to the shipwreck. At all events, the point is too doubtful in itself to justify us in adopting it as the basis of any reasoning in the present case. The case before the King's Bench was confessedly new, and does not appear upon this point to have been much argued at the bar. It seems to have been decided, principally upon the ground of the absence of any authority in favor of the assured; and as it appears to us, in opposition to the analogies furnished by other acknowledged doctrines in the law of insurance. The same question, however, has undergone the deliberate consideration of some of the greatest maritime jurists of Continental Europe; and the result at which they have arrived is directly opposite to that of the King's Bench."

But the weight of authority is now decidedly in harmony with the principal case. *General M. Ins. Co. v. Sherwood*, 11 Howard (U. S. Supr. Ct.),

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351, reversing the decision in Blatchford; *Matthews v. Howard Ins. Co.*, 11 New York, 9, reversing the case in Barbou; *Street v. Augusta Ins. & B. Co.*, 12 Richardson Law (So. Car.), 13; 75 Am. Dec. 714.

In the Sherwood case, in the Federal Supreme Court, Mr. Justice CURTIS observed: "Now, although cases like the present must have very frequently occurred, we are not aware of any evidence that underwriters have paid such claims, or that down to the time when one somewhat resembling it was rejected by the Court of King's Bench, in *De Vaux v. Salvador* (4 Adol. & Ell.), decided in 1836, such a claim was ever made. And we believe that if skilful merchants, or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel, not insured by the policy, by a collision occasioned by the negligence of those on board the vessel insured, they would, down to a very recent period, have answered, unhesitatingly, in the negative."

"We know of no principle of insurance law which prevents us from looking for this sole operative cause, or requires us to stop short of it, in applying the maxim *causa proxima non remota spectatur*. The argument is, that collision, being a peril of the sea, the negligence which caused that peril to occur is not to be inquired into; it lies behind the peril, and is too remote. This is true when the loss was inflicted by collision, or was by law a necessary consequence of it. The underwriter cannot set up the negligence of the servants of the assured as a defence. But in this case he does not seek to go behind the cause of loss, and defend himself by showing this cause was produced by negligence. The insured himself goes behind the collision, and shows, as the sole reason why he has paid the money, that the negligence of his servants compelled him to pay it. It is true that an expense, attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion the policy cannot be so construed. When a peril of the sea is a proximate cause of the loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them.

"These views are sustained by many authorities. Mr. Arnould, in his valuable Treatise on Insurance, (vol. ii. p. 775), lays down the correct rule: 'Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged.' To this rule must be

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referred that class of cases, in which the misconduct of the master or mariners has either aggravated the consequences of a peril insured against, or been of itself the efficient cause of the whole loss. Thus, if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the want of such repairs the vessel is lost, the neglect to make repairs, and not the sea damage, has been treated as the proximate cause of the loss. In the case of *Copeland v. The N. E. Marine Ins. Co.*, (2 Met. 432,) Mr. Chief Justice SHAW reviews many of the cases, and states that ‘the actual cause of the loss is the want of repair, for which the assured are responsible, and not the sea damage which caused the want of repair, for which it is admitted the underwriters are responsible.’ And the same principles were applied by Mr. Justice STORY, in the case of *Hazard v. N. E. Marine Ins. Co.* (1 Sum. R. 218), where the loss was by worms, which got access to the vessel in consequence of her bottom being injured by stranding, which injury the master neglected to repair. So where a vessel has been lost or disabled, and the cargo saved, a loss caused by the neglect of the master to tranship, or repair his vessel and carry the cargo, cannot be recovered. *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21; *Bradhurst v. Col. Ins. Co.*, 9 Johns. 17; *Am. Ins. Co. v. Center*, 4 Wend. 45; s. c. 7 Cow. 564; *McGaw v. Ocean Ins. Co.*, 23 Pick. 405. So where condemnation of a neutral vessel was caused by resistance of search; *Robinson v. Jones*, 8 Mass. 536; or a loss arose from the master’s negligently leaving the ship’s register on shore; *Cleveland v. Union Ins. Co.*, 8 Mass. 308. So where a vessel was burnt by the public authorities of a place into which the master sailed with a false bill of health, having the plague on board; *Emerigon* (by Meredith), 348; in these and many other similar cases, the courts, having found the efficient cause of the loss to be some neglect of duty by the master, have held the underwriter discharged. Yet it is obvious that, in all such cases, one of the perils insured against fell on the vessel. And they are to be reconciled with the other rule, that a loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril, by bearing in mind that in these cases it is negligence, and not simply a peril of the sea, which is the operative cause of the loss. It may sometimes be difficult to trace this distinction, and mistakes have doubtless been made in applying it, but it is one of no small importance in the law of insurance, and cannot be disregarded without producing confusion. The two rules are in themselves consistent. Indeed, they are both but applications, to different cases, of the maxim, *causa proxima non remota spectatur*. In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss.

“The case at bar presents an illustration of both rules. So far as the brig

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*Emily* was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against, and the assured, showing that his vessel suffered damage from that cause, makes a case, and is entitled to recover. But he claims to recover not only for the damages done to his vessel, which was insured, but for damages done to the other vessel, which was not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision; and aver that by reason of the existence of that cause the loss was suffered by him, and so the underwriter became responsible for it.

“This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the *Virginia* was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause.”

“It has been urged that in the case of the *Paragon* (*Peters v. Warren Ins. Co.*, 14 Pet. 99), this Court adopted a rule which, if applied to the case at bar, would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against.

“We are aware that in the case of *Hale v. Washington Ins. Co.* (2 Story), Mr. Justice STORY took a different view of this question; and we are informed that the Supreme Court of Massachusetts has recently decided a case in conformity with his opinion, which is not yet in print, and which we have not been able to see. But with great respect for that very eminent Judge, and for that learned and able Court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants; and that it is the safer and more expedient rule.

“We cannot doubt that the knowledge by owners, masters, and seamen, that underwriters were responsible for all the damage done by collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property arising from this cause.”

In *Matthews v. Howard Ins. Co.*, *supra*, the Court observed: “I think moreover that the point has been settled upon authority to which we ought to defer. The question has never arisen in the Courts of this State. When this case was decided by the Supreme Court, there was a precedent in favor

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of the plaintiffs in the Circuit Court of the United States. (*Hale v. Washington Ins. Co.*, 2 Story, 176.) Pending this appeal, a case in all its features like the one under review was determined in the Supreme Court of the United States adversely to the plaintiffs. (*General Mutual Ins. Co. v. Sherwood*, 14 How. 351.) In the able opinion delivered by Mr. Justice CURTIS, and which would appear from the report to have been the unanimous opinion of the Court, the case before Judge STORY was overruled, and the doctrine was established that the negligence of the master and crew in such a case was the sole efficient cause of the loss, and that the insurers were not responsible. It was also held that the case of *Peters v. The Warren Ins. Co.* (14 Pet. 99), was inapplicable. In that case the insurers were held liable for a loss happening to a vessel not insured, by a collision with the one upon which the defendants were underwriters. But the collision was accidental, and the loss was visited upon the insured vessel and her owners by the peculiar laws of a foreign country within whose jurisdiction the accident happened. The decision was diametrically opposed to a judgment of the King's Bench in a precisely similar case. (*De Vaux v. Salvador*, 4 Adol. & Ellis, 420; 31 Eng. C. L. 104.) We are not called upon to pronounce upon these conflicting decisions. It is sufficient to say that if the case in 14th Peters sustains the judgment under review, and so far as it sustains it, it is overruled by the subsequent decision of the same Court just referred to. There are strong reasons why we ought to follow the Supreme Court of the United States in this case. In a large class of cases it has concurrent jurisdiction upon questions of insurance with the appellate Courts of all the States, and it is of great importance that the decisions upon such questions should be uniform. From the commercial and financial prominence of the city of New York, it is to be expected that many such controversies will have their origin there in which citizens of other States will be interested parties, and it would be unfortunate if a different rule prevailed in our tribunals from the one which obtains in the Federal Courts. It is only necessary to add that the opinion delivered by Mr. Justice CURTIS appears to be sustained by the Continental writers on the law of marine insurance, as will be seen by examining the treatises to which he has referred, and as will also be seen by a reference to the opinion of Judge STORY in the case of *Hale v. The Washington Ins. Co.*

Another Judge in the same case observed: "There are but two reported cases in this country upon this question. In *Hale v. Washington Ins. Co.* (2 Story, 176), and *Sherwood v. General Mutual Ins. Co.* (1 Blatchf. C. C. 251), it was held that the policy extended to such a loss. But both these cases are overruled by the Supreme Court of the United States in 14 How. 351, where the judgment of the Circuit Court in *Sherwood v. Mutual Ins. Co.* was reversed. The whole question is there discussed with great ability by Mr. Justice CURTIS, and his reasoning is conclusive to my mind against the claim. It cannot be necessary to repeat this argument. So far therefore as the United States Courts are concerned, it must now be regarded as authoritatively settled that such a claim cannot be maintained, when, as in this case, the collision was chargeable solely to the carelessness or negligence of the persons in charge of the insured vessel.

No. 77.—*Bell v. Carstairs*, 14 East, 374.—Rule.

On this point there has been no reported case in the State Courts of this country. It is said that just before the late decision of the Supreme Court of the United States a case had been decided by the Supreme Court of Massachusetts in accordance with the views expressed in 2 Story; but it has not been reported, and we have not been furnished with a copy of the opinion. We have no means, therefore, of knowing its extent or application. Whatever they may have been, as it was no doubt based upon the two decisions of the United States Circuit Court, which have been since overruled, it can no longer have any foundation whatever as authority.

"The judgment of the Supreme Court of the United States in *Sherwood v. Mutual Ins. Co.* is in accordance with the well-settled English law (*De Vaux v. Salvador*, 4 Adol. & Ell. 420; 31 Eng. C. L.); and also with the French law."

"It is believed such is also the law in all the other maritime countries of Europe in which the civil law is recognized as the basis of their jurisprudence."

"Similar opinions have been expressed by writers on insurance in our own tongue."

No. 77.—BELL *v.* CARSTAIRS.

(K. B. 1811.)

## RULE.

IN the case of an ordinary policy on ship, where the ship is captured and condemned for want of proper documents to prove nationality as required by treaty between the country of the ship and that of the captors, the want of proper documents is the proximate cause of the loss, and is not within the perils insured against.

**Bell and others *v.* Carstairs.**

14 East, 374—394 (12 R. R. 557).

*Insurance.—Condemnation for want of Documents showing Neutrality.—Proximate Cause of Loss.*

If a neutral American ship, insured here, be captured by a French ship, [374] and condemned in a French court, as prize, upon the express ground stated in the sentence of condemnation, (which is evidence for this purpose,) that the ship was not properly documented according to the existing treaty between France and the United States of America (conjointly with the suppression of papers by the captain after the capture; on which no opinion was given by the Court); the neutral assured cannot recover their loss against the British under-

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writer, although there was no warranty or representation that the ship was American; the neglect of the shipowners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. Neither can the agent of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time and for the same reason; such assured of the goods being implicated in the same neglect in their character of shipowners. But it is otherwise in the case of a mere assured of goods, who is not answerable for the proper documenting of the ship, without a warranty or representation of her national character.

This was an action by the assured against an underwriter, on a policy of insurance effected by the plaintiffs on the ship *Eliza*, at and from Virginia to a market in Holland or Germany, with leave to touch at or off Falmouth for orders, and also with liberty in that voyage to proceed to any port or places whatsoever, to seek, join, and exchange convoy, to take papers and clearances for any ports or places whatsoever, at a premium of 12 guineas per cent, with various returns. The policy stated the insurance to be on ship valued at £4050, on freight valued at £3000, and on certain goods specified at different valuations, and on other goods. The declaration stated that the ship sailed upon the voyage insured with the specified cargo. In one count, Bell, Cumming, and C. and F. Whittle and Morgan, were alleged to be interested in the ship and freight; and Bell, Cumming, and C. and F. Whittle in the cargo, to the amount insured; and in another count the

[\*375] interest in ship, freight, and cargo was laid generally in Bell, Cumming, and C. \* and F. Whittle. The declaration further averred that the ship and cargo were totally lost by capture in the course of the voyage, and that the assured had expended a large sum in endeavouring to recover them. At the trial before Lord ELLENBOROUGH, Ch. J., at Guildhall, a verdict was found for the plaintiffs for £304 7s., subject to the opinion of the Court on the following case.

The policy was effected by the plaintiffs as agents for Bell, Cumming, C. and F. Whittle, and Morgan, who are citizens of the United States of America, and were interested in the ship, freight, and cargo, as averred in the declaration. These persons all resided within the United States of America at the time when the insurance was effected, and have continued to reside there ever since. No warranty or representation was made to the defendant that the ship or cargo was American; but both the ship and cargo

were American in point of fact. The ship sailed from Norfolk in Virginia on the 10th of July, 1809, with a cargo of the description mentioned in the policy, and on the 10th of August following was captured off Plymouth by the French privateer, *Jean Bart*, and carried into Brehat; and the ship and cargo were afterwards condemned by a sentence of the Imperial Council of Prizes at Paris, the same being a Court of competent jurisdiction on this subject. In the narrative part of that sentence it is stated that there was found on board the said ship, among other papers, the following: a passport, in four languages, in the usual form, dated at Norfolk, 27th June, 1809, signed by the President of the United States, countersigned, and sealed, stating Norfolk to be the place of departure, and Tonningen the place of destination. It states, as do all the other passports, "that, prior to the departure, the captain shall make oath that \* the ship belongs to none [\* 376] but citizens of the United States, and that the act of such affidavit shall be written at foot thereof; the form whereof is in substance printed thereunder; the blanks are filled up with the hand, but it is neither signed nor sealed." The sentence goes on to allege that the following, amongst other reasons for confiscation, presented itself in the memorials: "The passport expresses that the captain is to make oath, previous to her departure, that the ship belongs to citizens of the United States, and that this act is to be written underneath the passport. Now the form of this affidavit, it is true, is printed according to custom; the blanks are even filled up with writing; but there is neither seal nor signature thereto. It is, therefore, a nonentity, and the passport, which necessarily supposes it, is likewise of no value. According to the convention of the 8th Vendemaire, 9th year, an American captain who shall have lost his passport is permitted to supply that defect by other proofs of neutrality; but here it is not the case. Jacob Vickery is furnished with a passport, which the public officer has refused to sign, no doubt because the nationality of the captain, or that of the owners, did not appear to him sufficiently substantiated. The passport, therefore, has continued to be nothing more than a form; it is destitute of that which ought to complete it; and the captain has navigated without a passport. This is what the council decided on the 16th Thermidor, 8th year, in confiscating the prize made by the privateer, the *Spartiate*, of the American ship, the *Republican*, which had a passport in which the affidavit

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was not signed." After further stating the process verbal and other proceedings that had been had, the sentence proceeds [<sup>\* 377</sup>] to condemn the ship and cargo \* in the following terms:

"Whereas it appears by the pleadings that Captain Jacob Vickery, while at sea, took some papers out of his trunk previous to his going aboard the privateer, and delivered them to the second mate, who has, since his arrival at Brehat, caused them to be returned to the captain. That this fact is corroborated by John Thomas, chief mate, and by William Barker and John Robinson, seamen; and that these papers having never since reappeared, no doubt remains but they have been withdrawn, and that there is the greater reason to apply, with all its severity, the third article of the regulation of the 26th July, 1778. That the denial of the second mate, to whom the papers were given, and the tergiversations of the captain, constitute a sufficient proof that, if they had come to light, they would have betrayed the prize. That, in truth, the captain (although contradicting himself in his interrogatory and in his declaration before the council) pretended that the papers, by him given at sea to his second mate, were no others than the second set of papers for Amsterdam, which, on the 12th of August, the day of their entry into Brehat Roads, he had, in the presence of several persons, delivered to the officer of police, and which were added to the package containing the papers which the privateer had taken possession of. But the contrary is evident, as well from the verbal process, which was very minutely drawn up at the time of their arrival at Brehat, on the 12th and 13th of August, by the officer of police, who alone acted, as from the certificate delivered by the same officer on the 16th of January last, which proves, in the most formal manner, that the package of ship's papers, which, at the time of the inventory

[<sup>\* 378</sup>] \* being drawn up, comprised the Amsterdam papers, was opened a short time after their arrival at Brehat; but there being no interpreter present that could give a description thereof, it was sealed up with the seal of Captain Vickery and that of the mayoralty, and that no papers were enclosed therein besides those found on its being opened. Whereas also the affidavit, the form whereof is at foot of the passport of the President of the United States, not being furnished with any signature, it follows that the passport does not fulfil the conditions required by the convention of the 8th Vendemaire, 9th year, in order to make it valid, and that

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therefore it ought to be considered as of no effect; which, together with the circumstances of the withdrawing the papers, involves the confiscation of the prize, and renders it unnecessary to enter into the merits of the other charges brought by the captors concerning the navigation of the *Eliza*. Our council decides that the capture made by the privateer, the *Jean Bart*, of the ship *Eliza*, under American colours, carried into Brehat, is good and lawful; and therefore adjudges to the owner and crew of the said privateer as well the said ship as the goods of her loading; the whole to be sold in manner and form prescribed by the laws and regulations concerning prizes, and the net proceeds to be paid over to the said owner and crew."

By the fourth article of the convention between the French Republic and the United States of America, concluded at Paris the 30th of September, 1800, it is provided as follows: "Property captured and not yet definitively condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted) shall be mutually restored on \*the following proofs of ownership, viz., the proof on [\*379] both sides, with respect to merchant ships, whether armed or unarmed, shall be a passeport in the form following: To all who shall see these presents, greeting: It is hereby made known, that leave and permission has been given to , master and commander of the ship called , of the town of , burthen tons or thereabouts, lying at present in the port and haven of , and bound for , and laden with . After that his ship has been visited, and before sailing he shall make oath before the officers who have the jurisdiction of maritime affairs, that the said ship belongs to one or more of the subjects of , the act whereof shall be put at the end of these presents. As likewise, that he will keep and cause to be kept, by his crew on board, the marine ordinances and regulations, and enter in the proper office a list signed and witnessed, containing the names and surnames, the places of birth and abode, of the crew of his ship, and of all who shall embark on board her, whom he shall not take on board without the knowledge and permission of the officers of marine. And in every port or haven where he shall enter with his ship, he shall show this present leave to the officers and judges of the marine, and shall give a faithful account to them of what

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passed and what was done during his voyage; and he shall carry the colours, arms, and ensigns of the French Republic (or of the United States) during his voyage. In witness whereof we have signed these presents, and put the seals of our arms thereunto, and caused the same to be countersigned by                                  at

, the                day of               , anno domini           .

[\* 380] And the passport will be sufficient \* without any other paper, any ordinance to the contrary notwithstanding; which passport shall not be deemed requisite to have been renewed or recalled, whatever number of voyages the said ship may have made, unless she shall have returned home within the space of a year. Proof with respect to the cargo shall be certificates containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound: so that the forbidden and contraband goods may be distinguished by the certificates; which certificates shall have been made out by the officers of the place whence the ship set sail, in the accustomed form of the country. And if such passports or certificates, or both, shall have been destroyed by accident or taken away by force, their deficiency may be supplied by such other proofs of ownership as are admissible by the general usage of nations." By the 17th article of the said convention, it is provided that, when one party shall be engaged in war, and the other party shall be neutral, the ships of the neutral party shall be furnished with passports similar to that described in the 4th article, that it may appear thereby that the ships really belong to the citizens of the neutral party; and that, if the ships be laden, they shall be provided not only with the passports above mentioned, but also with certificates similar to those described in the same article, so that it may be known whether they carry any contraband goods. By an additional article inserted previous to the ratification, it was agreed that this convention should be in force for the term of eight years from the time of exchange of ratifications. The convention, with this additional article, was ratified by the President of the United States and

by the First Consul of the French Republic; and the ratifications were exchanged \* at Paris on the 31st July, 1801.

[\* 381] By an *arrêt* for the regulation of the French marine, dated 26th July, 1778, article 3, referred to in the above sentence of condemnation, it is declared that all vessels with their cargoes, whether neutral or allied, from which any papers have been thrown

into the sea, suppressed, or abstracted, shall be declared good prize, upon proof that papers have been thrown into the sea, without inquiring what those papers were, or by whom thrown, and though sufficient remain to prove that the ship and cargo belonged to friends or allies. If this Court were of opinion that the plaintiffs were entitled to recover, the verdict was to stand; otherwise a nonsuit was to be entered.

J. W. Warren, on a former day in this term, argued for the plaintiffs, the assured, that the underwriter could not avail himself of either of the grounds of condemnation stated in the sentence; the suppression of papers by the captain after the capture, against a French ordinance, to which the American government was no party; or the want of a sufficient passport, in the form required by the treaty between France and the United States of America. [The former point having been, in effect, abandoned by the counsel for the defendant, he proceeded to argue the second ground.] He denied that there was an implied warranty [382] that a ship insured should be properly documented according to the treaties of her nation with foreign powers. It is a question depending upon the intention of the parties to the contract, and nothing can be implied in a contract beyond its terms, except what is of the essence of it. Now nothing is of the essence of a contract of marine insurance, except those things without which the ship would be, at all events, incapable of performing her voyage; such as seaworthiness, and men and furniture necessary for the voyage, which are conditions precedent; but not anything the want of which only goes to increase the risk, as was said by LAWRENCE, J., in *Christie v. Secretan*, 8 T. R. 192. [LE BLANC, J.—The breach of an implied warranty would protect the underwriter, though the loss happened from another cause; but though the proper documenting of the ship were not a condition precedent or an implied warranty, yet if the loss happened from the want of that which the assured themselves ought to have provided, could it be within the intention of the parties to the contract that the underwriters should be liable for a loss occasioned by the default of the assured themselves.] *Christie v. Secretan* [383] was the first case in which any intimation is to be found of an implied warranty that the ship should be documented according to her national treaties; but the Court were not all agreed upon that point, which was only collateral to the

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judgment; and so far as that was applied to an insurance on goods, the contrary was afterwards ruled in *Dawson v. Atty*, 7 East, 367.

[384] Campbell, *contra*, contended, first, that the sentence of condemnation stated a clear infraction of a treaty between France and America, of the existence and duration of which the Prize Court were competent judges, and their adjudication upon the matter is final and conclusive between these parties, according to the express decision of this Court upon a similar question in *Boring v. The Royal Exchange Assurance Company*.

5 East, 99 (7 R. R. 657). Though the period first assigned [385] to the treaty had expired at the time of the capture, yet it might have been prolonged by another convention, and this Court would presume that it was so, if necessary to support the sentence. But it is clear that the ship sailed before the treaty had expired, and the proper documenting of a ship must refer to the original sailing from her own port. [Lord ELLENBOROUGH, Ch. J., inquired how the treaty was worded in that respect, and was referred to the form of the passport set out in the 4th article.] It must have been so considered in *Rich v. Parker*, 7 T. R. 705 (p. 149, *ante*), where the assured of ship and goods, warranted American, failed in his action against the underwriter for want of such a passport at her first sailing, though she took it on board before she was captured, and produced it at the time to the commander of the French privateer. [Lord ELLENBOROUGH, Ch. J. -- That being the case of a warranty of the national character of the ship, the warranty would of course cover the voyage from its commencement; but this not being the case of a warranty, the only question can be, whether the assured, by their own act, occasioned their own loss.] The foreign sentence says that they did, and is conclusive of the fact. He then contended, 2ndly, that there was either an implied warranty in every policy of insurance that the treaties which bound the ship of the particular nation with others should be observed at all events; or, 3rdly, that where, as in this case, the very cause of the loss was the want of proper national documents, which it was the duty of the shipowners to have pro-

vided, that was such gross negligence in them that they [386] could not recover against the underwriters. There is always an implied warranty of seaworthiness, by which the assured engages that the ship shall be "rendered as secure as possible from

capture by the enemy, as well as from the danger of winds and waves;”<sup>1</sup> and for any original deficiency of the ship in that respect the underwriter may protect himself against losses by other perils; yet such deficiency only enhances the risk more or less, for a ship not seaworthy in the proper and general sense of the word might yet be able to perform the voyage with a continuance of favourable weather. There is an implied warranty in every policy, not only that the ship itself shall be seaworthy, but that she should be furnished with everything necessary for the purpose of safe and careful navigation during the voyage,—a sufficient crew, and a captain and pilot of competent skill. *Law v. Hollingsworth*, 7 T. R. 100, Park, 301; and *Farmer v. Legge*, 7 T. R. 186; and he also cited Hubner, vol. i. part 2, s. 1. The same principle applies to the proper documenting of a ship according [387] to her national character, the want of which renders her navigation equally insecure from capture and detention, as the other requisites do from winds and waves. Roceus (note, 98) says that, if a ship be seized for want of a passport, which she ought to have had, it discharges the underwriter. And in a case in Chancery, *Anon.* 2 Vern. 176, Lord Commissioner HUTCHINS said “that a policy of insurance against restraints of princes extends not where the insured shall navigate against the law of countries,” &c. In a late case of *Steele v. Lacy*, M. 51 Geo. III. in C. B., which was an action on a policy on a ship from a port in Great Britain to Riga and back again, the ship was not warranted, but only represented, to be American; and having been met by a British cruiser in the course of her voyage, who demanded her passport, which she refused, was thereupon brought into port and condemned; and the Court held that, as she was bound to carry a passport, and did not produce it when demanded, it was a good cause of condemnation, and therefore the assured could not recover. By the 18th article of the treaty between France and America, an American ship is bound, if met with at sea by a French ship of war or privateer, to show her passport; and in *Rich v. Parker*, 7 T. R. 709 (p. 149, *ante*), where the ship was warranted American, Lord KENYON said that the warranty was not satisfied by merely showing that, in fact, the ship was American property: but the under-

<sup>1</sup> This was quoted from the report of Lord ELLENBOROUGH’s summing up in *Wedderburn v. Bell*, 1 Camp. 1 (10 R. R. 615), and in Park, 304; but Lord ELLEN-

BOROUGH, Ch. J., observed that by the words “as secure as possible” must only be understood “reasonably secure.”

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writer was not to be liable to any inconvenience or impediment in her voyage from her not being in the condition required [388] by the treaty with France. Here, then, at all events, was gross negligence in the assured in not providing their ship with a passport, which it was their duty to have done; and in consequence of their own negligence the loss has been sustained.

[389] J. W. Warren, in reply.

[390] Lord ELLENBOROUGH, Ch. J., then said that it was not from any doubt which he entertained upon the present question that he wished to look further into the cases which had been cited, before the Court delivered their opinion upon this case, but from a desire to avoid using expressions unnecessarily, which might be considered as clashing with other cases, he thought

[\*391] it more advisable to take \*further time for consideration.

Towards the end of the term his Lordship delivered the judgment of the Court.

This was an insurance upon the ship *Eliza*, her freight and goods, effected by the plaintiffs as agents for certain citizens of America, the proprietors thereof, in whom the interest in these three several subjects of insurance was averred in the declaration to be. There was no warranty or representation made to the defendant that the ship or cargo was American; though they were so in point of fact. The ship was captured in the course of her voyage by the *Jean Bart*, a French privateer, and condemned by the Imperial Council of Prizes at Paris. A passport is stated to have been found on board the ship, but that there was neither seal nor signature to the affidavit underneath such passport, as required by the treaty between France and America. The sentence, reciting that, "Whereas the affidavit, the form whereof is at the foot of the passport of the President of the United States, not being furnished with any signature, it follows that the passport does not fulfil the conditions required by the convention of the 8th Vendemaire, 9th year, in order to make it valid, and that therefore it ought to be considered as of no effect; which, together with the circumstance of the withdrawing the papers, involves the confiscation of the prize, and renders it unnecessary to enter into the merits of the other charges brought by the captors concerning the navigation of the ship *Eliza*: our council decides that the capture made by the privateer (the *Jean Bart*) of the ship *Eliza*, under American colours, carried into Brehat, is good and lawful:

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and proceeds to adjudge the ship, goods, &c., to be sold in manner \* and form prescribed by the regulations concerning prizes," &c. This is unquestionably such an adjudication of the capture of the property assured as prize as *prima facie* entitles the plaintiff to recover as for a loss by capture within the terms of his policy. But as the sentence is in our opinion equally to be regarded as evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation itself, it is material to look at the alleged ground of condemnation, in order to see whether it has been occasioned by any act or neglect on the part of the assured; for if it has been so occasioned, it would not be a loss against which the assured would, upon any principle of reason or justice as applied to this species of contract, be required to indemnify him: the indemnity stipulated on his part being only against the perils described in the policy, as far as they operate upon the property insured adversely, and not through the medium of any act or neglect on the part of the assured himself, producing the loss of the property insured. In the present case (laying out of our consideration the subtraction of the papers, solely because the defendant's counsel, relying on the other objection being in his favour, has chosen expressly to renounce relying in argument on such subtraction as a competent ground of condemnation) the nullity of passport from the defects stated as belonging to it, and to which the underwriter's objection is confined, is the circumstance immediately inducing the condemnation in question, and for which the owner is responsible, and that whether the want of this document arose from his own default or from that of his captain, inasmuch as there is no count for barratry in this declaration, nor any evidence suggested to support it, if there had been such a \* count. But it is said, inasmuch as there was no warranty or representation of the ship being American in this case, that upon the authority of *Dawson and another v. Atty*, 7 East, 367, and in conformity to the principle of our decision in that case, we are bound to hold the want of proper documents (required by the treaty between France and America) to be immaterial. But it will be recollect that this was laid down in the case of an insurance upon goods, where the owner of goods has no concern in the obtaining of the proper documents with which the vessel is to be furnished for her voyage; and if

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that which is laid down as said by me at *Nisi Prius* in p. 367 of that case be so qualified, viz. by a reference to the insurance as being on goods, nothing will be found which will even colourably be at variance with what is held by us on the present occasion. In p. 368 of that case I am reported as having said, with the concurrence of the other Judges, "that, as the ship was not represented to be American at the time when the insurance was effected, the assured was not bound by it; and there being no undertaking in the policy itself that she was an American, there was no necessity for her being documented as such." This is also true with reference to a policy such as that was, on goods. But in a policy on ship (and this whether there is a warranty or representation respecting the nation to which a ship belongs or not), as the shipowner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect to such nations, the want of them in the event of capture, and when the production of them becomes necessary, is most material. But in respect to a ship which is not the object [\*394] either of representation or warranty, the existence of \* such papers at the commencement of the voyage (which in *Rich v. Parker*, 7 T. R. 705 (p. 149, *ante*), were held necessary to a warranted ship), or the want of them at any other time or for any other purpose but the one above specified, is immaterial. In *Christie v. Secretan*, 8 T. R. 192, it might be sufficient to sustain the judgment as given in favour of the plaintiffs, to say that that was also the case of an insurance on goods, without warranty or representation as to the nation of the ship; and that in such case the assured, the owner of goods, was not liable to suffer in respect of his insurance, on account of any defect in the documents belonging to the ship, with the procurement or existence of which he had no concern: but the judgment certainly rests upon a different foundation; indeed, upon one which (according to the opinion we have intimated, viz., that the alleged grounds of a foreign sentence, as well as the sentence itself, are to be looked to), must be deemed by us more questionable. In respect to the case now before us, upon the single ground which has been already suggested, namely, that the three subjects of insurance, ship, goods, and freight, all of them belonging to nearly the same American proprietors, were condemned on account of the common default of all the proprietors in their joint character of shipowners,

in not having a regular passport on board, as required by the treaty of their own State with France, we are of opinion that the plaintiffs, the assured, cannot claim from the underwriter an indemnity for a loss thus occasioned by themselves; and, consequently, that in this case a nonsuit is to be entered.

## ENGLISH NOTES.

In *Thompson v. Hopper* (1856), 6 El. & Bl. 937, 26 L. J. Q. B. 18, which was an action upon a time-policy, there was evidence that the ship had been wilfully sent to sea in an unseaworthy state. There was a verdict to the effect that the unseaworthy condition was a cause contributing to the disaster which followed, namely, that the ship was driven ashore by a squall and wrecked. But the immediate and proximate cause was an accident in paying out the cable. The verdict having been entered for the plaintiff on these findings, the Court ordered a new trial. In the judgment delivered by Lord CAMPBELL, Ch. J., he said: “Is it to be said, that to exempt the insurers from liability the misconduct of the assured must be the direct and proximate cause of the loss? We think that, for this purpose, the misconduct need not be the *causa causans*, but that the assured cannot recover if their misconduct was the *causa sine qua non*. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of the loss, the assurers are not liable.” It has been already shown that this consequence of misconduct does not apply to mere negligence. *Trinder v. North Queensland Ins. Co.*, cited p. 292, *ante*. And see next case (No. 78) and notes.

On a somewhat similar principle, the insured has been held disentitled to recover where the loss has been the natural result of an inherent defect in the thing itself. In *Paterson v. Harris* (1861), 1 B. & S. 336, 30 L. J. Q. 354, the insurance was by a shareholder in the adventure of laying an Atlantic cable, “including every accident and risk that may be incurred by sea or land;” and the insurance was to include the successful working of the cable when laid down. The cable was successfully laid down, but soon became unworkable through defective insulation. The insulation being defective, it was the natural and necessary consequence of the action of the sea water that it should cease to work. The Court held that the loss was not within the perils insured. The case of *Taylor v. Dunbar*, cited p. 304, *ante*, depends on a similar principle.

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No. 78.—*Busk v. Royal Exchange Assurance Co.*, 2 Barn. & Ald. 73.—Rule.

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#### AMERICAN NOTES.

This case is cited in *Warren v. Manuf. Ins. Co.*, 13 Pickering (Mass.), 522, but as pointed out by Mr. Duer (1 Insurance, p. 385), had no applicability to that case.

In *Cleveland v. Union Ins. Co.*, 8 Massachusetts, 308, the company was held not answerable for loss by capture occasioned by negligence of the master in not having his register; but this seems overruled in *Nelson v. Suffolk Ins. Co.*, 8 Cushing, 477; 54 Am. Dec. 770.

#### No. 78.—BUSK v. ROYAL EXCHANGE ASSURANCE COMPANY.

(K. B. 1818.)

#### RULE.

WHERE a ship is insured against (*inter alia*) fire, the insurer is liable for loss by fire caused by negligence of the master or crew,—the insured having satisfied the warranty of seaworthiness by having provided a competent crew in the first instance.

#### **Busk v. Royal Exchange Assurance Company.**

2 Barn. & Ald. 73-83 (20 R. R. 350).

*Insurance.—Fire.—Negligence of Master and Crew.*

[73] In an action on a policy on ship, by which, amongst other risks, the underwriters insured against fire and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners.

*Held*, also, that where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty that the ship should be properly manned.

Covenant upon a policy of assurance on the ship *Carolina*, at and from Amsterdam to St. Petersburgh. The policy was in the usual form, and stated, amongst other risks which the defendants took upon themselves, “fire, barratry of the master and mariners, and all other perils, losses, and misfortunes that should come to the hurt, detriment, or damage of the said ship.” The declaration averred the interest to be in the plaintiff, and alleged that, during

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the voyage insured, the ship was consumed by fire. The defendants pleaded that they had not broken their covenant. The cause was tried before ABBOTT, J., at the London sittings after Trinity Term, 1817, when the jury found a verdict for the defendants. In the ensuing term a rule was obtained to show cause why the verdict should not be set aside and a new trial granted, and cause being shown at the sittings before Hilary Term following, the Court ordered the facts to be stated in the following case.

The policy was duly executed by the defendants, and the plaintiff was interested in the manner alleged. The *Carolina* was a Russian ship, and navigated by a Russian crew. She sailed from Amsterdam on the voyage insured on the 3rd October, 1815, being then properly manned and equipped. In the course of the voyage she met with tempestuous weather, and on the \* 25th [\* 74] November she was forced to put into Biorkoo Sound, a Russian port, at the top of the Gulf of Finland; here she was frozen up for the winter. It was proved to be the custom, when Russian ships are so frozen up, to pay off the crew, and to leave the ship in the care of the master or the mate, and to hire a fresh crew for prosecuting the voyage, at the breaking up of the ice in the ensuing spring. When ships which are not Russian are frozen up in Biorkoo Sound, a lodging is taken for the crew on shore, where they all live, except one, who continues on board to take care of the ship. The master of the *Carolina*, upon arriving in Biorkoo Sound, paid off his crew, left the ship in the care of the mate, and proceeded himself to St. Petersburg to settle the ship's accounts, with the intention of returning to complete the voyage when the season would permit. The mate continued in charge of the ship till the 9th day of January following. On that day he lighted a fire in the ship's cabin, and in the evening, without leaving anybody on board the *Carolina*, he went on board another Russian ship lying contiguous. There he remained for the night. At twelve at night he awoke, and went on the deck of the ship which he had joined; looking round he found everything quiet, and went down again to bed. About four o'clock the following morning he was alarmed by a fire which had broken out in the *Carolina*, and was then raging through the cabin windows, the round-house, and on the main hatchway. In spite of all that could be done to extinguish the flames, the vessel was soon consumed to the water's edge. The loss arose from the negligence of

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the mate in lighting a fire in the cabin, and not seeing [\* 75] that it was properly extinguished. It was admitted \* that the ship would have been sufficiently protected during the winter, in the care of the mate, had he done his duty.

The question for the opinion of the Court was, whether the defendants were exempted from their liability for the loss, on the ground of its having been occasioned by the negligence of the mate?

Campbell, for the plaintiff. — If the assured be not entitled to recover in this case, a policy of assurance in the common form will not afford a complete indemnity against all the risks incident to maritime adventure. The assured has performed the whole of his duty; the ship was seaworthy and properly manned at the commencement of the voyage, and the mate, who at the time of the loss had the charge of the ship, was duly qualified for his situation. The policy therefore attached, and no blame being imputable to the assured, the underwriters are not discharged from their liability. Fire is a risk expressly insured against, and *Green v. Elmslie*, 1 Peake, 278 (3 R. R. 693), and *Licic v. Janson*, 12 East, 648 (11 R. R. 513), are authorities to show that the proximate and not the remote cause is to be looked to as the efficient cause of loss; and therefore, within the rule established in those cases, the defendants are liable. But on reason and principle they are responsible for a loss by fire, although that fire be produced by the negligence of the persons having the care of the ship, who for that purpose are to be considered as the servants of the owner; for if the proximate cause of the loss had been fire

and the remote cause barratry, the underwriters would be [\* 76] liable, by \* the express terms of the policy; and inasmuch as the assurers expressly undertake to indemnify the assured against the wilful misconduct of their servants, it must be presumed that they intended also to indemnify them against their negligence. In the case of the insurance of a house against fire, the assurers are liable for the negligence of servants. *Austen v. Drew*, 6 Taunt. 436, 4 Camp. 360 (16 R. R. 647). And, upon principle, there seems to be no difference between that and a marine insurance, as far as this species of loss is concerned. If the negligence of the master be a ground of resisting a claim for indemnity against a loss by fire, it will be equally so in the case of a loss by capture or perils of the sea; and then it may become

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a nice question, whether a sufficient watch was kept, or whether a cable was taken in or an anchor let go in due time. It is a strong argument against this defence, that a loss has never been resisted on such a ground before. Our law does not afford any express authority upon this point, as far as the subject of marine insurance is concerned. The rule laid down by Emerigon, p. 434, is this, that where the policy contains a clause against barratry, the assurers are liable for the negligence of the master and mariners. It is true that the term "barratry" is used, in the French law, to express the negligent as well as the wilful misconduct of the mariners. Straccha and Targa there cited, who use the term "barratry" in its more limited sense, lay down the same rule, and the authority of those writers is directly in favour of the plaintiff's right to recover.

Bosanquet, Serjt., *contra*. — The assurers are not liable in this case, upon two grounds: First, because the loss \* was [\*77] occasioned by the negligence of the servant or agent, and constructively, therefore, by the negligence of the assured himself; and, secondly, because at the time of the loss, the mate having absented himself, the ship was not properly manned, and therefore there was a breach of an implied warranty. Upon the first point there is no express authority in our law, but the subject is considered both by Valin and Pothier. The former, in his Treatise on the French Ordinance of Marine, book 3, tit. 6, Des Assurances, article 27, vol. ii. p. 77, lays it down expressly, "that the assurers are not liable for losses by the fault of the master and mariners, if by the policy they are not charged with a loss by barratry;" and in page 79 he adds, art. 28 : "By the nature of the contract of assurance, the assured is not charged of right to answer but for losses which happen by accident or by chance of the sea; which is altogether foreign to the fault which the master and mariners may commit, and such is the common right." According to the opinion of Valin, therefore, the assurers, generally speaking, are not liable for a loss occasioned by the negligence of the master and mariners. In page 80 there is this passage: "Nevertheless, by agreement the assurers may be bound to indemnify the assured, and for this it is only necessary to charge them in the policy with barratry of the patron,—energetic terms which absolutely comprehend all the damage which can result from the act of the master and his crew, whether by unskil-

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fulness, imprudence, malice, deviation, theft, or otherwise;" and Pothier, in his Treatise upon Insurance, chap. 1, sect. 2, art. 2, § 5, p. 26, is an authority precisely to the same effect. The substance, therefore, of these authorities is, that the assurers [\*78] \* are not liable for the negligence of the master and mariners, unless in express terms they insure against that risk; for the term "barratry," in the French law, comprehends the negligence as well as fraudulent misconduct of the master or mariners. In our law, however, it is used in a more restricted sense, and denotes only the criminal misconduct of the master and mariners. By the express terms of this policy, therefore, the assurers have insured only against the fraud, and not against the negligence, of the master or mariners; and, therefore, upon the authority of Valin and Pothier, they are not liable for this loss. There is no analogy between marine insurance and insurance of houses against fire. Generally speaking, a servant can hardly be considered as the agent of the proprietor in the care of his house. The latter is generally present himself; but the master of a ship, on the other hand, is the uncontrolled agent of the owners for all purposes connected with the care and management of the ship, and his acts, within the scope of his authority, may be considered as the acts of the owners. But, secondly, in this case the assured has been guilty of the breach of an implied warranty; for admitting that for all necessary purposes the mate, during the detention of the ship in the ice, constituted a sufficient crew, yet at the time of the loss he was absent, and therefore the ship was not then properly manned. *Law v. Hollingsworth*, 7 T. R. 160, and *Tait v. Levi*, 14 East, 481 (13 R. R. 289), are authorities expressly in point.

Campbell, in reply. — Straeccha and Targa, who use the term "barratry" in its limited sense, hold that the assurers [\*79] \* are liable for a loss by the negligence of the master and mariners. By insuring, in express terms, against the criminal misconduct of their servants, they must by implication be intended to have insured against the negligent misconduct of the servants. As to the second point, the owners have complied with the implied warranty by providing a competent crew at the commencement of the voyage. In *Law v. Hollingsworth* the ship at the time of the loss had not the pilot required by the Act of Parliament, and in *Tait v. Levi* she never had a competent captain.

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BAYLEY, J.—The question which the facts of this case present for the consideration of the Court is, whether the underwriters, on a policy of insurance on ship, are liable for a loss by fire, that fire having arisen from the negligence of the person who, at the time of the loss, had the charge of the vessel. The policy expressly throws upon the underwriters the liability for all losses proceeding from “fire, barratry of the master and mariners, and all other perils, losses, and misfortunes that should come to the hurt, detriment, or damage of the ship.” The object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable *prima facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners? If the ship had been wilfully set on fire, it would have been barratry, and the underwriters would be liable; but it has been argued that the underwriters are only liable for a loss by barratry, because that is one of the risks expressly mentioned in the policy, and that the negligence of the \* master and mariners not being a risk [\* 80] expressly described in the policy, the underwriters are not liable for a loss thereby occasioned. In this case, however, the loss is occasioned by fire, against which the assured is protected by the terms of the policy; and, in our law at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners. If, indeed, the negligence of the master would exonerate the underwriter from responsibility in case of a loss by fire, it would also do so in cases of loss by capture or perils of the sea; and it would therefore constitute a good defence in an action upon a policy, to show that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power. It is certainly a strong argument against the objection, now raised for the first time, that, in the great variety of cases upon marine policies which have been the subjects of litigation in Courts of justice (the facts of many of which must have presented a ground for such a defence), no such point has ever been made. There is certainly no authority in our law against the plaintiff’s right to recover, and the authority of Malynes, p. 111, (as far as it goes,) is rather the other

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\*[81] way.<sup>1</sup> \*The opinions of the foreign writers, referred to in the course of the argument, are founded upon the particular language of the several policies which are the subject of their comments, and may perhaps afford a correct rule of law in the construction of those instruments used on the Continent, but they are wholly inapplicable to policies used in this country, which are very differently worded. We must, however, decide this question according to the law of this country, and with reference to the specific terms used in the instrument now before us. The different opinions of foreign writers are collected by Emerigon, *Traité des Assurances*, c. 12, s. 17, p. 434, and it appears that Straccha was of opinion that the assurers were liable for fire occasioned by the fault of the mariners; but then he is speaking of the policy used at Ancona, by the terms of which the assured undertake for the barratry of the master. Targa, too, lays down the same doctrine, but then he is speaking of the law of Genoa, by which the assurers were exonerated from losses by barratry (strictly so called), although they are answerable for the fault of the mariners. Emerigon lays down the same doctrine, and states the law to be the same at Hamburgh, Rouen, Nantes, and Boudeaux; but that at Marseilles the assurers are liable for fire when the result of accident, but not for fire occasioned by the negligence or fault of the mariners, unless, by an express clause, they make

themselves liable for the barratry of the master; and in [\*82] page 436 he refers to a case of fire, \*occasioned by the fault of the master or mariners, where the assurers were held responsible; but in that case they had insured against barratry, and he states as his opinion, that, unless they had so done, they would not have been liable for such a loss. The fair result, therefore, of all these authorities, is this, that the underwriters are liable for a loss by fire occasioned by the negligence of the master and mariners, provided they insure against barratry, that

<sup>1</sup> The following passage from Malynes was cited by the learned Judge in the course of the argument. In speaking of the risk of fire, he says, "In this case let us also consider the case of the assurer; for it hath oftentimes happened, that, by a candle unadvisedly used by the boys or otherwise, before the ships were unladen, they have been set on fire and burnt to the very keel with all the goods in them, and the

assurers have paid the sums of money by them assured." And then he goes on to observe, that "in many of these cases the assurers were not liable, the cargoes having before the fire been sold while on ship-board, and then destined to some other place;" but he does not intimate any doubt as to the propriety of paying the loss on the ground that the fire had been occasioned by the negligence of the mariners.

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term being, in the French writers, used in its larger sense, as comprehending negligence as well as wilful misconduct; but, inasmuch as the term "barratry" is used in our policies in a more limited sense, as applicable only to the wilful misconduct of the master or mariners, the authority of Emerigon affords no ground for our decision in this case. We must, therefore, endeavour to collect the meaning of the contracting parties from the terms of the policy itself, and in considering whether the assured claiming for a loss by fire is to have that claim disallowed on the ground that the fire was occasioned by the misconduct of the master, we must look to the other terms of the policy, and learn from them whether the assurers, in other instances, are responsible for the misconduct of the master; and when we find that they make themselves answerable for the wilful misconduct of the master in other cases, it is not too much to say that they meant to indemnify the assured against fire proceeding from the negligence of the master and mariners. I am therefore of opinion in this case, that the assured are entitled to recover, as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time. It has been \*argued, [\*83] that in this case there was a breach of an implied warranty: and that, there being no person on board the vessel at the time of the loss, she was not properly manned, and consequently not seaworthy. The owner certainly is bound, in the first instance, to provide the ship with a competent crew, but he does not undertake for the conduct of that crew in the subsequent part of the voyage. It is not disputed in this case that the assured had provided a competent crew, and that at the time of the loss the mate himself was sufficient for all the purposes required. There was therefore a competent crew left in charge of the ship, and the implied warranty has been complied with. The cases cited with reference to this point are quite beside the question. The case of *Law v. Hollingsworth* proceeded on the ground that the ship at the time of the loss had not on board a pilot required by the Act of Parliament; and in *Tuit v. Levi* there was a breach of the implied warranty to provide a master of competent skill. I therefore think that the plaintiff, upon the facts stated in this case, was entitled to recover, and that there must be a new trial.

ABBOTT and HOLROYD, JJ., concurred.

*Rule absolute for a new trial.*

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## ENGLISH NOTES.

The insurers on an ordinary policy are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners: *Walker v. Maitland* (1821), 5 B. & Ald. 171, 24 R. R. 320; *Bishop v. Pentland* (1827), 7 B. & C. 219, 31 R. R. 177; *Redman v. Wilson* (1845), 14 M. & W. 476, 14 L. J. Ex. 333. Still less can they be excused on the ground that the loss by peril of the sea is more remotely caused by an error of judgment on the part of the master, assuming him to be a person of competent skill. *Phillips v. Headlam* (1831), 2 B. & Ad. 380, where the captain, having signalled for a pilot, and none having come on board, attempted to enter the port without one, and in doing so ran the ship aground.

## AMERICAN NOTES.

This doctrine is sustained in *Patapsco Ins. Co. v. Coulter*, 3 Peters (U. S. Supr. Ct.), 222; *Fireman's Ins. Co. v. Powell*, 13 B. Monroe (Kentucky), 311; *St. Louis Ins. Co. v. Glasgow*, 8 Missouri, 713; *Henderson v. West. M. & F. Ins. Co.*, 10 Robinson (Louisiana), 164; 43 Am. Dec. 176; *Georgia Ins. & T. Co. v. Dawson*, 2 Gill (Maryland), 365; *American Ins. Co. v. Insley*, 7 Penn. St. 223; 47 Am. Dec. 509; *Nelson v. Suffolk Ins. Co.*, 8 Cushing (Mass.), 477; 54 Am. Dec. 770 (overruling *Cleveland v. Union Ins. Co.*, 8 Mass. 308); *Perrin v. Prot. Ins. Co.*, 11 Ohio, 147; 38 Am. Dec. 728; citing the principal case (overruling earlier cases); *Enterprise Ins. Co. v. Parisot*. 35 Id. 35; 35 Am. Rep. 793; citing the principal case and *Walker v. Maitland*.

The contrary was held in *Grim v. Phanix Ins. Co.*, 13 Johnson (N. Y.), 458, (A. D. 1816), saying, "No adjudged case is to be found directly in point."

A competent master is essential to seaworthiness. *Draper v. Conn. Ins. Co.*, 21 New York, 380.

In *Patapsco Ins. Co. v. Coulter*, *supra*, the Court said: "It would be a great relief to this Court, if there existed such an uniformity in the decisions upon this subject as to place our decision upon adjudged cases. But it is not to be questioned, that the English and American decisions are in direct hostility with each other, as to a loss by fire arising from negligence, where there is an insurance against barratry.

"It must be repeated, that the general question where there is no insurance against barratry need not here be considered. The judge was not bound to give an instruction abstracted from the case. And the question whether, where the breach laid was loss by fire only, the plaintiff could maintain his action by giving in evidence a barratrous burning, did not properly occur. The point when properly stated stands thus: the plaintiff lays the breach by fire, and the defendant, to repel his liability insists that the fire was produced by negligence of the master; the plaintiff replies that negligence is no defence where the barratry was insured against; the Court

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maintains the doctrine of the plaintiff, and adds, that negligence itself, when gross, is evidence of barratry. And certainly a master of a vessel who sees another in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is *prima facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners. So if, in the height of a storm, the captain and crew turn in without resorting to the nautical precautions of laying the vessel to and otherwise preparing her to overcome the peril, it may well be left to a jury to determine if such conduct be not barratrous.

"The truth is, that in the incidents to this kind of contract, misfeasance and nonfeasance often approach so near to each other in character and consequences, that it is not surprising if Courts of justice should incline to the adoption of rules which would relieve them from the difficulty of discriminating, or the inconsistencies that might result from their efforts to discriminate.

"The case of *Grim v. The Phoenix Ins. Co.*, decided in New York, was certainly a very strong case to establish the doctrine that a loss by fire, proceeding from negligence of the master and mariners, was not a loss within the policy, although barratry be one of the risks. It will, however, be found, by looking into the reasons which governed the Court in that case, that its conclusions were drawn partly from the too general expressions of an elementary writer, and partly from analogy with other decisions in which the expressions of the Court, unless restricted to the cases before them, were justly deemed authority for the decision there rendered. The question was one of the first impression, and one on which the best constituted minds may well have been led to contrary conclusions. It was however no unreasonable claim upon the profession made by LAWRENCE, Justice, in the case of *Phyn v. The Royal Ex. Ass. Co.*, with regard to his own doctrines in *Moss v. Byrom*, 'that what fell from him there must be taken in reference to the case then in judgment before the Court.' Thus restricted doctrines will often be found correct, which in a more general sense might well be questioned. And in the case of *Voss and Graves v. The Union Ins. Co.*, and also in that of *Cleveland v. The Union Ins. Co.*, relied upon in the New York decision, the act of the master, for which the underwriters were held to be discharged, was in the first instance sailing towards a blockaded port with intent to violate the blockade, and in the second, leaving his register behind him. The first of these cases did not call for the opinion of KENT, Justice, on the subject of negligence; the second is exactly one of those cases in which a nonfeasance becomes a misfeasance, and both relate to the discharge of a duty unquestionably belonging to the insured, and the master as his agent. Attempting a breach of blockade was an unwarrantable increase of risk, which might or might not be barratrous according to circumstances. And for a vessel to leave her register behind in time of war affected her seaworthiness as much as leaving her compass or quadrant or anchors at home at any time. So neglecting to take a pilot, neglecting to pay port duties, neglecting to obtain a clearance, neglecting to comply with the laws of any port which the vessel has leave to enter; all these, although nonfeasances, involve misfeasances, which dis-

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charge the underwriters, because they violate implied duties incident to navigating the vessel, and produce a positive and definite increase of risk.

"It was not until the year 1818, that the question was settled in the British Courts, on the liability of the underwriters for a loss like the present. In the case of *Busk v. The Royal Exchange Ass. Co.*, the question is finally and fully decided there, in direct hostility with the decision in New York; and this Court is now for the first time called upon to establish a rule for its own government in similar cases.

"Losses by fire must happen either from the act of God, from design, or from accident. If from design, and by the captain and crew, it is barratry; if by any other person, or by pure accident, it is clearly a risk by fire, but, from the peculiar character of this risk, it is no easy matter to point out an accident that may not be resolved into negligence. If by the falling of a candle, it may have been because due care was not bestowed upon securing it; and if from a spark from the camboose, it may have been from neglect in not closing or constructing it; and if from a flue or a stove, the same reason may be assigned. It has already been shown that gross negligence may be evidence of barratry, and when it is considered how difficult it is to decide where gross negligence ends and ordinary negligence begins, and to distinguish between pure accident and accident from negligence, we cannot but think that the British Courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire be the proximate cause, they will not sustain the defence that negligence was the remote cause.

"We think this rule also the most consistent with analogy and mercantile understanding. It is very justly observed in the case of *Busk v. The Royal Exchange Ass. Co.*, that it is a strong argument against the objection there raised for the first time, that in the great variety of cases that have occurred upon marine policies, no such point had ever been made. And now I will add, it is not improbable from comparison of dates, that the defence maintained in the New York decision suggested that made in the British Courts."

In *Waters v. Merchants' Louisville Ins. Co.* (A. D. 1837), 11 Peters (U. S. Supr. Ct.), 213, STORY, J., observed: "It is certainly somewhat remarkable that the question now before us should never have been directly presented in the American or English Courts; viz. whether in a marine policy (as this may well enough be called), where the risk of fire is taken, and the risk of barratry is not (as is the predicament of the present case), a loss by fire, remotely caused by negligence, is a loss within the policy. But it is scarcely a matter of less surprise, considering the great length of time during which policies against both risks have been in constant use among merchants, that the question of a loss by negligence in a policy against both risks should not have arisen in either country until a comparatively recent period.

"If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion that a loss by a peril insured against and occasioned by negligence is a loss within a marine policy; unless there be some other language in it which repels that conclusion. Such

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a loss is within the words, and it is incumbent upon those who seek to make any exception from the words to show that it is not within the intent of the policy. There is nothing unreasonable, unjust, or inconsistent with public policy in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal frauds. It was well observed by Mr. Justice BAYLEY, in delivering the opinion of the Court in *Busk v. Royal Exchange Assurance Company*” (quoting from the opinion): “There is great force in this reasoning, and the practical inconvenience of carrying out such an implied exception from the general peril in the policy furnishes a strong ground against it; and it is to be remembered that the exception is to be created by construction of the Court, and is not found in the terms of the policy. The reasons of public policy, and the presumption of intention in the parties to make such an exception, ought to be very clear and unequivocal to justify the Court in such a course. So far from any such policy being clear and unequivocal, it may be affirmed that they lean the other way. The practical inconvenience of creating such an exception would be very great. Lord TENTERDEN alluded to it in *Walker v. Maitland*, 5 Barn. & Ald. 174.” (Quoting his words.) “His Lordship might have stated the argument from inconvenience, even in a more general form. If negligence of the master or crew were under such circumstances a good defence, it would be perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard.

“This is not all: we must interpret this instrument according to the known principles of the common law. It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: *causa proxima non remota spectatur*: and this has become a maxim, not only to govern other cases, but (as will presently be shown) to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case; and why it should not be so applied we are unable to see any reason.”

“Then came the case of *The Patapsco Insurance Company v. Coulter*, 3 Peters, 222, where the loss was by fire, and barratry also was insured against. The Court on that occasion held that, in such a policy, a loss which was remotely caused by the master or the crew was a risk taken in the policy: and the doctrine in the English cases already cited was approved. It is true that the Court lay great stress on the fact that barratry was insured against; but it may also be stated that this ground was not exclusively relied on, for the Court expressly refer to and adopt the doctrine of the English cases, that the proximate and not the remote cause of a loss is to be looked to. It is

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known to those of us who constituted a part of the Court at that time, that a majority of the Judges were then of opinion for the plaintiff, upon this last general ground, independently of the other.

"It was under these circumstances that the case of *The Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters, 507, came on for argument; and the Court then thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion; and, on the contrary, upon the present argument, we are confirmed in it."

In *Matthews v. Howard Ins. Co.*, 11 New York, 9, the Court said: "It was held in this State, in *Grim v. Phoenix Ins. Co.* (13 Johns. 451), where the vessel, among other risks, was insured against fire, which was occasioned by the carelessness of one of the crew, not amounting to barratry. And such were the earlier decisions in Massachusetts and Ohio. (8 Mass. 308; 5 Ohio, 436; 7 Id. 2.) But in those States, and in others, that doctrine has been expressly overruled. (*Copeland v. New England Ins. Co.*, 2 Metc. 432; *Perrin v. Protection Ins. Co.*, 11 Ohio, 147; 10 Robinson, 164; 2 Gill, 365; 7 Penn. St. 223; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbia Ins. Co. v. Lawrence*, 10 Id. 507; *Waters v. Merchants' Ins. Co.*, 11 Id. 213; 14 Id. 99; 2 Story, 176.) And the cases last cited are in accordance with the English decisions. (2 B. & Ald. 73; 5 Id. 74; 5 Mees. & Wels. 14; Id. 476, 495; 8 Id. 895; 7 B. & C. 219; Id. 794, note a.) It is apparent that the weight of authority is against the holding in *Grim v. Phoenix Ins. Co.*, and such is the opinion expressed by Chancellor KENT (3 Kent's Com. 300, 306, 307); and though that case has never been expressly overruled in this State, it seems to have been virtually abandoned (3 Hill, 253; 5 N. Y. 469, 478); and I think we are bound to hold the rule to be as it was stated by Verplanck, Senator, in the *American Ins. Co. v. Bryan* (26 Wend. 583), that underwriters are not discharged from risks expressly assumed, because the losses were incurred, remotely or consequentially, by the default of the master or mariners."

"We understand it is the settled rule in this country and in England, if a loss is incurred by a peril insured against, the insurers are liable, although the remote cause be the negligence of the officers and crew. The proximate cause was the storm, a peril of the sea and of navigation, and that was the risk taken by the company. *Waters v. Merchants' Life Ins. Co.*, 1 McLean, 275; 11 Peters, 213; *Firemen's Insurance Co. v. Powell*, 13 B. Monroe, 311; *Nelson v. Suffolk Ins. Co.*, 8 Cushing, 447; *Walker v. Maitland*, 5 Barn. & Ald. 175; *Dixon v. Sadler*, 5 Mees. & Wels. 465; 2 Arnould on Insurance, 770": *National Insurance Co. v. Webster*, 83 Illinois, 470.

## No. 79.—EARLE v. ROWCROFT, 8 East, 126.—Rule.

No. 79.—EARLE *v.* ROWCROFT.

(K. B. 1806.)

## RULE.

AN unlawful act intentionally committed by the master or mariners, if unauthorized by the owners, is barratry; although the person so acting had no motive of benefit to himself, but supposed himself to be promoting the interest of the owners.

**Earle and others v. Rowcroft.**

8 East, 126-140 (9 R. R. 385).

***Insurance.—Barratry.—Wilful, Unlawful, and Unauthorized Acts.***

Barratry is any fraudulent or criminal conduct against the owners of [126] the ship or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expense the master or mariners. And therefore, where a master had general instructions to make the best purchases with despatch, this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous.

This was an action on a policy of insurance, dated 28th January, 1804, on the ship *Annabella*, at and from Liverpool to the coast of Africa, during her stay and trade there, and to the port of sale in the West Indies, with liberty to exchange goods, &c.; and the plaintiff averred a loss by barratry of the master. It appeared at the trial at Guildhall, that the master, who was also supercargo, on his arrival off Cape Coast Castle, a British settlement on the coast of Africa, let go an anchor, and began to trade there for two days; but receiving intelligence that he could barter his goods for slaves more expeditiously and advantageously at D'Elmina, a Dutch fort about 7 miles to windward, he weighed anchor and proceeded to this latter place, which had the Dutch flag flying and guns mounted, where he exchanged his goods, consisting, amongst other things, of muskets and gunpowder, with the Dutch governor and another resident there, for slaves: Holland being at that time at war with Great Britain, and he having a letter of marque on board against

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the French and Dutch. After taking on board a number of slaves, the captain, who was then on shore at D'Elmina, receiving information that an English frigate was in sight, sent a note on board the *Annabella*, directing her to sail immediately from thence to Cape Coast, to prevent, as he expressed himself, mischief; but before she reached the latter place she was pursued and captured by the English frigate, and sent to Jamaica, where she was condemned

[\* 127] as prize, for having traded with the \* enemy. It appeared

further, that it had been usual to keep up a trading intercourse, in boats and small craft, between the English and Dutch settlements on this part of the coast, even in times of war between the mother countries; and that the captain's object in going to D'Elmina was to complete his cargo as cheaply and expeditiously as he could. It was admitted that he had no particular instructions to go there, but that he was directed generally to make the best purchases with despatch. It was also in proof, that when the ship was about to go to D'Elmina, the surgeon asked the captain if there was no impropriety in going there; to which he answered that they should be gone soon and nobody would know it. And also that, besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord ELLENBOROUGH, Ch. J., was of opinion that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry; on which the plaintiff was entitled to recover in this action: but the case being new *in specie*, his Lordship gave the defendant leave to move the Court to set aside the verdict for the plaintiff, and enter a nonsuit. A rule *nisi* was accordingly obtained for that purpose early in the term; against which

Sir V. Gibbs, Park, Topping, Marshall, Serjt., and Scarlett, showed cause, and contended that the act of the captain, in going to trade at an enemy's settlement, unauthorized as it was by his owners,

[\* 128] and illegal in itself, thereby subjecting their property to seizure and confiscation, \* though intended for their benefit

as well as his own, was barratrous. That the act of trading with an enemy, and going into his port for that purpose, is illegal, and subjects the ship and cargo to confiscation, cannot be disputed; and the sale of arms and ammunition to them does not lessen the illegality. And no continuation or repetition of such

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illegal practices can render them less unlawful. This the captain was bound to know. Besides which, there is evidence in the case to show that he was conscious at the time of the risk his owners were incurring by his misconduct. Next the act was unauthorized by the owners. Nothing short of their positive directions to go to D'Elmina could excuse him as to them. It was not enough that he had a discretion given to him to trade where he thought best on the coast, and instruction "to make the best purchases with despatch;" for that must mean legal purchases and legal despatch. [Lord ELLENBOROUGH, Ch. J.—Certainly it must be so considered] Then an illegal act by a captain of a ship, unauthorized by his owners, and contrary to his duty to them, by which he exposes their property to confiscation, is criminal and barratrous as against them: although, if successful, it might have been advantageous to them, as well as to himself. For it is not necessary to constitute barratry that the immediate object of the captain should be to benefit himself at the expense of his owners. This appears from all the text writers and cases upon the subject. (*Vide* Park on Insur. ch. 5, and Marshall, b. 1, ch. 13, s. 6, and the authorities cited.) In *Knight v. Cambridge*, 1 Stra. 581, 2 Lord Raym. 1349, 8 Mod. 230, it was decided, as appears from later cases, (*vide Stamma v. Brown*, 2 Stra. 1174, and the MS. note of that case afterwards referred to, and *Vallejo v. Wheeler*, Cowp. 153,) for that point is not stated in \* the printed reports of the case, that the sailing [\* 129] out of port, without paying duties, whereby the ship was subjected to forfeiture, was barratry: and yet that could only have enured, if successful, to the benefit of the owners, and not of the master. But in *Stamma v. Brown*, 2 Stra. 1173, from whence a contrary doctrine may at first sight appear to be deducible, the act complained of, namely deviation, was ambiguous in its nature, and might have been done innocently or ignorantly, and not with a fraudulent intent. And therefore in ascertaining such intent it might be proper to inquire whether or not the deviation were intended for the master's or owner's benefit. And the same explanation is given by Lord MANSFIELD of the case of *Elton v. Brogden*, 2 Stra. 1264, in *Vallejo v. Wheeler*, Cowp. 154: the act of deviation, namely, the returning into port a second time upon the capture of a second prize, was shown not to be barratrous, being done for the benefit of the owners. In this case, however, there is no necessity for adverting to the criterion of intent; because the act, which was

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wilful, is in itself illegal, and necessarily injurious to the owners. Mr. Justice BULLER, in *Saloueci v. Johnson*, B. R. Tr. 25 Geo. III., (Park on Insur. ch. 18, near the conclusion,) had no doubt that if the resistance of a neutral ship to be searched by a belligerent were a breach of neutrality, (which has since been so determined in *Garrrels v. Kensington*, 8 T. R. 230, 4 R. R. 635,) it would be an act of barratry; being contrary to the master's duty: and yet it is plain that the master's motive could only be to serve his owners. And

no doubt that the breach of an embargo would be barratry; [\* 130] though it was unnecessary to \* decide that point in *Robertson v. Ewer*, 1 T. R. 129 (1 R. R. 164), as smuggling has

since been holden to be in *Harelock v. Hancil*, 3 T. R. 277 (1 R. R. 703). Next, however, to the case of evading the port duties, they relied principally upon *Moss v. Byrom*, 6 T. R. 379 (3 R. R. 208), as governing the present case. There a ship, having taken out a letter of marque (but without a certificate, which is necessary to its validity) merely to encourage seamen to enter, and without any intention of using it to cruise; the captain, contrary to his instructions, cruised for and took a prize; and his ship was afterwards lost, in consequence of his following the prize into Bermuda. This was contended not to be barratry, because the capture was made for the benefit of the owners, which was evinced by the prize being libell'd in their, as well as the captain's name: but the Court thought that made no difference; and that the act, being contrary to the captain's duty to his owner, was barratry. The principle and judgment of that case are not at all impeached by that of *Phyn v. The Royal Exchange Assurance Company*, 7 T. R. 508 (4 R. R. 508), or by what was there said in explanation of the former case: for the circumstances of the former, as well as of the present case, fall in with the definition of barratry relied on in *Phyn v. The Royal Exchange Assurance Company*, given from the MS. note of *Stamma v. Brown*, namely, that it is "a breach of trust in the master *ex maleficio*;" and therefore it was holden that a deviation through mere ignorance would not be barratry. And this falls in with the distinction before taken between acts of the captain in themselves

illegal, and necessarily subjecting the property of his owner [\* 131] to hazard; such as the making prize in the former \* case

without lawful authority, and the trading with an enemy in the present case; and acts which are in themselves ambiguous, such as deviation, where evidence of intent may be let in to explain

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them. In *Moss v. Byrom*, as in this case, the captain sought a benefit to himself through the medium of an act, which, if it succeeded, necessarily benefited his owners also; but in both cases he risked the whole of his owner's property, while his own risk was comparatively small: and whatever his motive might be, which it would be difficult to prove, the act itself was a public offence, and necessarily injurious to his owners, and therefore comes within every definition of barratry.

Garrow and Marryat, *contra*.—All the books agree that barratry imports fraud and crime in the master or mariners against their owners. The act must be a breach of trust, and done *ex maleficio*, or *malo animo*. There is no case, as was said in *Phyn v. The Royal Exchange Assurance Company*, 7 T. R. 505 (4 R. R. 508), which says that an act is barratrous, merely because it is against the interest of the owners, unless it be done with a criminal intent; and such an intent is necessarily implied in the very definition of barratry. How then can it be applied to this case, where the obvious motive of the act was to make the cheapest and speediest purchases for his employers? for the benefit to himself from expediting the voyage bore no comparison to theirs: what he gained in receiving his commissions sooner would in part be balanced by receiving so much less wages reckoned by time. Besides, the going into D'Elmina was not done by him, as master, for any purpose of navigation, \* but, as [\* 132] supercargo, for commercial purposes. Admitting that the going into an enemy's port for this purpose might not be warranted by the legal import of the captain's instruction, yet if he erred through mistake, and intended to promote his owner's interest, it will be a crime as against those owners. And though the usage of the trade will not legalize the act, it serves to show *quo animo* it was done. The arms and ammunition were not sold to the Dutch for the purpose of hostility, but as the common articles of barter with the natives of the country for slaves. All the cases which show that deviation, unless made with intent to prejudice the owner, is not barratry, apply to this case: for some benefit is derived to the captain even from the protraction of the voyage. It is not enough that the act is illegal, unless the *malus animus* be specially directed against the owner. If the captain were guilty of murder, &c. upon a collateral occasion, whereby a prejudice ensued to his owner, that would not be barratry. In

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*Moss v. Byrom* the captain's act was that of a pirate and robber, done in direct contravention of the order of his owner, and of the charter-party under which he was sailing. But this was at most a mere error in judgment. And the supposed generality of the doctrine laid down in the former case was corrected and explained in *Phyn v. The Royal Exchange Assurance Company*. The only ease which bears at all the other way is that of the evasion of the port duties, of which there is a very imperfect account: and *non constat* with what intent the attempt was made.

Lord ELLENBOROUGH, Ch. J.—As the question raised involves in it the nature and definition of barratry in general, the [\*133] Court will look into the cases, and particularly \*that of the port duties, if any further information can be obtained of it before they deliver their opinion. But I cannot refrain from making a few observations at present upon the argument which has been urged. It has been asked, how is this act of the captain in going to D' Elmina, in order to purchase the cargo for his owners cheaper and more expeditiously, a breach of trust, as between him and them. Now I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any; and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage, because, in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot, therefore, for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, the observance of which, nothing being expressed to the contrary, is implied in their orders, does an act which is injurious to them.

His Lordship, a few days afterwards, delivered the judgment of the Court.

The question in this case is, whether a loss of a ship incurred by an illegal act of the master, not authorised by his owners, in going into D' Elmina, a Dutch and enemy's port on the coast of Africa, and trading there for slaves by a barter of arms and war-like stores, on account of which illegal traffic the vessel insured was seized by a King's ship, and afterwards condemned in the West

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Indies, be barratry; or whether, as contended on the part \* of the defendant, in order to constitute barratry, the act [\*134] should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners. It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance; and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between themselves, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters. So however it is, that this description of loss has, from the earliest times, held its place as a subject of indemnity in British policies of insurance. The original meaning of this term is to be collected from the Italian language, and is, according to Dufresne's Glossary, *verbum Barratrica*, "fraus, dolus, qui fit in Contractibus et Venditionibus." He does not apply it in any marine sense, or with reference to the particular relation of master and owners. In that sense, however, in which it is peculiarly used, as applied to subjects of British marine insurance, in the earliest reported case which we find on the subject, it is considered as being precisely tantamount to fraud, in the particular relation which subsists between master, mariners, and owners; being such by which a loss may happen to the subject-matter insured. In *Knight v. Cambridge*, 1 Str. 581, where the breach was assigned on a loss "per fraudem et negligentiam" of the master; and where it was objected, in arrest of judgment, that the fraud and negligence of the master were not within the policy, being more general \* than [\*135] the word Barratry; RAYMOND, J., in the report of the same case in 8 Mod. 531, held that "per fraudem *aut* negligentiam would not have been good."<sup>1</sup> So that the negligence was considered as immaterial, and the fraud as being the substantial matter constituting the barratry. And the Court (in the report in Strange)

<sup>1</sup> This is stated in the margin of the 2d edition of the 8th vol. of Mod. Rep. in 1769. Vide the preface to that edition; but it is not in the 1st edition of 1730, nor in the last, the 5th edition of 1795. The concluding sentence of the

case, as it stands in the edition of 1730 (which is not to be found in the two other editions I have referred to) is as follows: "And they (the whole Court) all agreed that fraud is barratry, though negligence might not: so the judgment was affirmed."

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held that negligence was not within the policy, but that fraud was. Now, as no limitation is put upon that term in the record in *Knight v. Cambridge*, we must understand the Court as holding that fraud and barratry were in effect words of coextensive import; that is, that barratry included every species of fraud in the relation of the master to his owners, by which the subject matter insured might be endangered. The particular manner in which the loss was in that case occasioned does not appear in any of the reports of it either in Strange, Lord Raymond, or 8 Modern. But a MS. note of Mr. Ford of the argument in *Stamma v. Brown*, in referring to the case of *Knight v. Cambridge*, and describing the question in that case upon the record, and stating that "fraud was barratry," adds, "If the master sail out of the port without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry,"<sup>1</sup> (and which probably was the question

of fact decided at the trial, or upon a case in the Common [\* 136] \* Pleas). And from what is said of the facts of *Knight*

v. *Cambridge*, in *Vallejo v. Wheeler*, Cowp. 153, both by counsel and by Lord MANSFIELD, it was a case in which the captain, whose duty it was to have paid the port duties before the ship went out of port, had not done so; and is therefore most probably the same case as is alluded to by Lord Ch. J. LEE, in *Stamma v. Brown*, 2 Stra. 1174, where he compared the case then in question "to the case of a sailing out of port, without paying duties, whereby the ship was subjected to forfeiture; and which had been, he says, holden to be barratry." In a MS. note of the case of *Stamma v. Brown*, which was read to us by my Brother LAWRENCE, Lord Ch. J. LEE defines barratry as being "some breach of trust in the captain *ex maleficio*." And in the note of the same case with which I have been furnished from Mr. Ford's MS., Lord Ch. J. LEE says: "Barratry must be *ex maleficio* with intent to destroy, waste, or embezzle the goods, (that, it must be remembered, was a policy on goods,) and therefore, although this might be a deviation, yet I do not see how it can be considered as barratry. I make no question that there may be such a deviation as will amount to barratry; as where the master deviates to burn, sink, destroy, or throw the ship into the enemy's hands; or where he has benefit by the deviation; as if he himself had insured the

<sup>1</sup> The same account of the case of *Knight v. Cambridge* is given by the coun- sel on both sides in the MS. argument of *Stamma v. Brown*.

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goods: and therefore it was a material part of the case, whether the master had any benefit by this alteration of the voyage; for that might have been evidence of fraud in him, &c." Of course he did not consider the benefit of the master as a necessary ingredient in the constitution of barratry in all cases, but only as a pregnant circumstance to prove the existence of such a fraud in point of fact, in a particular case. In *\*Nutt v. Bourdieu*, 1 T. R. 323 (1 R. R. 211), Lord MANSFIELD defines barratry nearly in the same terms, viz. as partaking of something criminal, and as committed against the owner by the master or mariners. And Lord HARDWICKE, in *Lewen v. Suasso*, Posteth, 147, tit. Assurance, had before defined it to be "an act of wrong done by the master against the ship and goods." WILLES, J., in giving the judgment of the court in *Lockyer v. Offley*, 1 T. R. 252 (1 R. R. 194), a case decided just before that of *Nutt v. Bourdieu*; and upon which occasion he must be understood as speaking in conformity with the opinion upon this point of Mr. Justice BULLER, who was then present, and probably after some communication on the subject with Lord MANSFIELD also, who happened then to be absent, defines barratry as including "every species of fraud or knavery of the master of the ship, by which the freighters or owners (the freighters in that case were owners *pro tempore*) are injured." And in *Vallejo v. Wheeler*, Cowp. 155, ASTON, J., after stating that the conduct of the master was clearly barratry, adds, as the reason which induced him to form that conclusion, "for he was acting for his own benefit, without intending any good to his owner, and without his consent and privity." Here considering, as Lord Ch. J. LEE had done before in *Stamma v. Brown*, the circumstance of private benefit accruing to the master as evidence of fraud in him in the particular case, and not essential to its constitution in all cases whatever. And he adds afterwards, "I am clearly of opinion that this change of the voyage for an iniquitous purpose was barratry; which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, \*by which the owners or freighters are injured." He [*\*138*] does not add, "and by which the master is benefited;" which he must have done if he had considered the actual or intended benefit of the master as essential to the definition of barratry. In *Robertson v. Ewer*, 1 T. R. 127 (1 R. R. 164), BULLER, J.,

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upon the trial, was of opinion, and it does not appear upon the argument to have been denied by the Court, that sailing out of port without leave, in breach of an embargo, in consequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, was barratry. The only question made by the Court was, whether a loss of this kind were recoverable on a policy upon the body of the ship. And although it was urged in argument for the defendant, that what was done by the master had been intended for the benefit of the owners, the Court did not advert to it as a point at all material to the decision of the question. In *Moss v. Byrom*, 6 T. R. 379 (3 R. R. 208), where a master, under letters of marque defective in point of validity for want of a certificate, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising, had cruised for and taken a prize, and had afterwards libelled such prize for condemnation in the name of himself and his owners, in a port in the West Indies, and during his stay there on that occasion was lost: this was held by Lord KENYON and the rest of the Court to be barratry. After these various decisions of courts of law, we are certainly warranted in pronouncing that a fraudulent breach of duty

by the master in respect to his owners; or, in other [\* 139] words, a breach of duty in respect to his owners, with \*

criminal intent, or *ex maleficio*, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant that if the conduct of the master, although criminal in respect of the state, were in his opinion likely to advance his owner's interest, and intended by him to do so, it will not be barratry. But to this we cannot assent. For it is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must

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be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine we feel ourselves supported by the several eminent authorities already referred to. And in giving this opinion we do not feel any apprehension that simple deviations will be turned into barratry, to the prejudice of the underwriters; for unless they be accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry, as above laid down.

\* Another argument was used, which hardly appears to [\*140] have been used seriously; namely, that the captain in this case united in himself the two characters of supercargo and captain; and that as captain he must be considered as obeying the directions of his owners, giving to himself, the captain, by himself in his character of supercargo. It is sufficient to state such an argument, to show that it can have no weight. The directions of the owners as to the conduct of the voyage, and as to places where the trade was to be carried on, are to be looked for in their instructions; which, coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country. For these reasons we are of opinion, that the rule *nisi*, which has been obtained in this case, must be discharged.

## ENGLISH NOTES.

The converse principle, that negligence of the master and mariners, even although the particular act is by statute deemed to be “wilful default,” is not barratry, is shown by the case of *Grill v. General Iron Screw Colliery Co.* (1868), 4 R. C. 680.

It does not appear, notwithstanding a statement in an early edition of Arnould on Insurance (1st ed. vol. ii. p. 838), that loss by barratry forms any exception to the general rule of *causa proxima non remota spectatur*. See per Lord BLACKBURN in *Cory v. Burr* (H. L. 1883), 8 App. Cas. 393, 52 L. J. Q. B. 657, 660, 49 L. T. 78, 31 W. R. 894. In the principal case it does not appear to have been suggested that the wrongful act of the master was not the proximate cause of the confiscation of the goods. In *Cory v. Burr*, *supra*, the insurance was against (*inter alia*) barratry, but there was a warranty “free from capture and

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seizure and the consequences of any attempt thereat.” The ship was seized by the Spanish revenue authorities for smuggling, which was, in effect, admitted to be the barratrous act of the master. The loss was held to be within the exception, although, if there had been no exception, it might (and according to Lord BLACKBURN clearly would) have been treated as a loss by barratry. In *Heyman v. Parish* (1809), 2 Camp. 149, 11 R. R. 688, it was held that a loss might be recovered as a loss by “perils of the sea,” although the shipwreck which caused the loss was itself caused by the conduct of those on board amounting to barratry.

Barratry can only be committed against the owner of the ship, and without his consent. *Nutt v. Bourdieu* (1786), 1 T. R. 323, 1 R. R. 211.

But where the owner of a ship by his contract has placed the vessel for a time entirely under the control of the freighter, the latter becomes *pro hac vice* the owner, so that any act of the general owner done in fraud of the freighter is an act of barratry. *Vallejo v. Wheeler*, Cowp. 153; s. c. Lofft, 645; *Soares v. Thornton* (1817), 7 Taunt. 629, 18 R. R. 615. On the other hand, where the owner has delegated the dominion of the ship to the charterer, and the master, by the orders of the charterer, has engaged in an illegal trade, that is not barratry as against the general owner; for in such a case the charterer is considered the agent of the general owner, and the orders given by the charterer are treated as if given by the general owner himself. *Hobbs v. Hannum* (1811), 3 Camp. 93, 13 R. R. 764.

The acts of a master who is part-owner of the ship may be barratrous against another part-owner: *Jones v. Nicholson* (1854), 10 Ex. 28, 23 L. J. Ex. 330. And those of a master who is mortgagor of the ship may be barratrous against the mortgagee, who for this purpose is in the position of a co-owner. *Small v. United Kingdom Marine Mutual Association* (C. A. 1897), 2 Q. B. 311, 66 L. J. Q. B. 736.

## AMERICAN NOTES.

The principal case is cited in 1 Parsons on Marine Insurance, p. 567; 2 Beach on Insurance, sect. 967.

“But if the master, knowing the inevitable danger of capture if he proceed on his voyage, should notwithstanding continue it, and expose the vessel to certain seizure, this will be a loss not arising from perils insured against, but from a criminal breach of the duty he owes to his owners, which is barratry.” *Richardson v. Marine Ins. Co.*, 6 Massachusetts, 117; 4 Am. Dec. 92, citing the principal case.

“It is essential to the offence of barratry that the act complained of should be either criminal or fraudulent on the part of the master.” *Wiggin v. Amory* 14 Massachusetts, 5; 7 Am. Dec. 175, citing the principal case, and observing: “The only point which seemed to be unsettled before that case was whether

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an act of the master, although criminal, was barratry, unless he intended by it to injure or defraud his owners. It seems extraordinary that such a doubt should have existed; and yet we find it contended at so late a period, that an illicit trading with the enemy was not barratry; because the master had in view the benefit of his owners, rather than his own. To settle this point only, was thought to require an elaborate argument of the Lord Chief Justice; but he is careful to prevent any inference being drawn against the principle, before so well settled, that without fraud or crime there can be no barratry; and he closes his argument with a caution not to infer from it that simple deviations can be turned into barratry, to the prejudice of underwriters; for he says there is no ease in which barratry can exist without fraud or crime.

"We think, after this view of the various decisions in England, there can be no longer a doubt of the state of the law there on this subject; and there is no reason why the same doctrine should not be admitted here. We have no decisions which militate with it; and there is no reason why barratry, which is in itself criminal and odious, should be imputed to conduct here which would not have that character in England.

"There may be violations of duty by a master, which may subject him to actions by his owners, and to suitable damages, without charging him with barratry; and it is for barratry only, according to its technical definition and meaning, that underwriters have stipulated to answer. Inferior misconduct is an affair between the owners and the master, for which the underwriters upon a policy do not undertake to indemnify; and there is no reason that they should, since they seldom, if ever, have a voice in the appointment of the master." See also *Lawton v. Sun M. Ins. Co.*, 2 Cushing (Mass.), 500 (SHAW, Ch. J.), citing the principal case; *Atkinson v. Gt. West. Ins. Co.*, 65 New York, 531. In the last case the Court said, "No act of the master of a vessel can be deemed barratry, unless it proceed from a criminal or fraudulent motive." But the principal case was cited and its holding approved, especially in the very learned opinion of DWIGHT, Com'r, who prefers the definition "breach of trust," given in the principal case, to that of "wilful misconduct," given in *Busk v. Royal Exchange Ass. Co.*, 2 Barn. & Ald. 82. In the *Lawton* case, *supra*, SHAW, Ch. J., observed: "It has been held not to be necessary that there should be fraud in the sense of an intention on the part of the master to promote his own benefit at the expense of the owners, but any unlawful act of known criminality or of gross malversation operating to the prejudice of the owner is, in legal contemplation, barratry." Citing the principal case. In *Kendrick v. Delafield*, 2 Caines (N. Y.), 72, KENT, J., said: "I do not think it was essential to be made to appear that the fraud was committed for the benefit of the master. If the master commits a fraudulent act, in his character of master, it is barratry. 2 Marsh. 444, 452. It is a criminal breach of duty in the relation in which he stands to the owner of the ship. The person to be benefited by the barratry need not be made affirmatively to appear. It is sufficient that the act was done with a fraudulent intent, and done by the captain, in his character of captain, and in breach of his duty and relation as captain. The law will intend that it was done to the injury of the owner until the contrary appears."

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No. 80.—**Koster v. Reed.** — Rule.

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The principal case was cited and approved in *Wilcocks v. Union Ins. Co.*, 2 Binney (Penn.), 580; 4 Am. Dec. 480, the Court observing, "It is of no consequence whether the captain has an interest of his own or not." In *Croussillat v. Ball*, 4 Dallas (Penn.), 294, A. D. 1803; 2 Am. Dec. 375, it was said, "If the act is done solely to benefit the owner, it does not constitute barratry;" and this is the holding of *Hood's Exrs. v. Nesbitt*, 2 Dallas, 140 (A. D. 1792); 1 Am. Dec. 275, the Court saying, "It is impossible to impute fraud to such disinterested conduct."

The principal case is also cited, approved, and applied analogically in *Brown v. Union Ins. Co.*, 4 Day (Connecticut), 179; 4 Am. Dec. 204; and in *Dedener v. Delaware Ins. Co.*, 2 Washington (U. S. Circ. Ct.), 66, it is said, "It is not essential to constitute the act of barratry that it should be to the interest of the master."

Barratry may be committed by the master in respect to cargo, although one person owns both ship and cargo and the master is supercargo. *Cook v. Com. Ins. Co.*, 11 Johnson (N. Y.), 40, the Court citing the principal case. But barratry cannot be committed by a master who is part owner of the vessel. *Wilson v. Gen. M. Ins. Co.*, 12 Cushing (Mass.), 360; 59 Am. Dec. 188, citing the principal case: "We are not aware of any decided case directly in point." *Contra: Meyer v. Gt. West. Ins. Co.*, 104 California, 381; *Voisin v. Com. M. Ins. Co.*, 62 Hun (N. Y.), 4; *Phœnix Ins. Co. v. Moog*, 78 Alabama, 284. See notes, 59 Am. Dec. 191. But it is immaterial that the assured owned the vessel and appointed the master and mariners. *Parkhurst v. Gloucester M. F. Ins. Co.*, 100 Mass. 301; 1 Am. Rep. 105.

"Generally, however, if an act is done for the benefit of the owners, although through a mistaken idea on the master's part, it is not barratry." *Dederer v. Delaware Ins. Co.*, 2 Washington (U. S. Circ. Ct.), 61.

Consumption of cargo by crew or passengers is not barratry. DUER, J., in *Moses v. Sun M. Ins. Co.*, 1 Duer (N. Y. Super. Ct.), 169, citing the principal case.

Loss through mere error or defect of judgment or through negligence is not barratry. *Wolff v. Merch. Ins. Co.*, 31 New Brunswick, 577.

## No. 80.—KOSTER v. REED.

(K. B. 1826.)

## RULE.

WHERE it is proved that a ship sailed on the voyage insured, and never arrived at the port of destination; that is *prima facie* evidence of her having foundered, and of a loss by perils of the sea: and a rumour that some of the crew survived does not throw the burden upon the assured to

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call them or show that endeavours had been made to procure their attendance.

**Koster v. Reed.**

6 Barn. & Cress. 19–23 (30 R. R. 239).

*Insurance.*—*Goods.*—*Prima facie Evidence of Loss.*—*Ship never arrived.*—  
*Rumoured to have foundered and some of the Crew saved.*

Where, in assumpsit on a policy of insurance on goods by a certain [19] ship, it was proved that she sailed on the voyage insured with the goods on board, and never arrived at her port of destination, and that a few days after her departure a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved: *Held*, that this was sufficient *primâ facie* evidence of a loss by perils of the sea, and that the plaintiff was not bound to call any of the crew, or to show that he was unable to procure their attendance.

Assumpsit on a policy of assurance on goods sent by *La Vergine della Solitudine*, on a voyage from Leghorn to Lisbon. The declaration averred that the policy was effected by the plaintiff as agent of Leon Taurel, that on the 9th of April, 1821, the goods insured were shipped at Leghorn, and that the vessel sailed on that day with the goods on board from Leghorn on the voyage insured, and was lost by perils of the sea. There was another count alleging a loss by barratry. Plea, the general issue. At the trial before ABBOTT, Ch. J., at the London sittings after last Trinity Term, it was proved that the vessel, with the goods insured on board, sailed from Leghorn in April, 1821, on the voyage insured, and that she never arrived at Lisbon; and a witness called by the plaintiff stated that three or four days after the vessel sailed from Leghorn he heard that she had foundered at sea, but that the crew were saved. For the defendant it was objected, that the mere fact of non-arrival did not prove a loss by perils of the sea or by barratry, and that if the evidence last stated were resorted to, it was incumbent on the plaintiff to call some of the crew, or to show that he had ineffectually endeavoured to procure their attendance. The LORD CHIEF JUSTICE overruled the objection, and summed up the whole of the evidence to the jury, who found a verdict for the plaintiff; and now

Barnewall moved for a rule *nisi* for a new trial. There was not in this case any evidence of a loss by \* perils [\* 20] of the sea or by barratry. As soon as it appeared that the

No. 80.—**Koster v. Reed, 6 Barn. & Cress. 20, 21.**

crew survived the loss of the ship, it was incumbent on the plaintiff to call them. [BAYLEY, J.—The evidence that the crew survived was merely hearsay evidence, and may be laid out of the case.] Then there was nothing to prove the loss, except the fact of non-arrival at Lisbon. It may be conceded that non-arrival after so long a period had elapsed proved a loss of some sort, but it did not prove a loss by the perils mentioned in the declaration. In every case to be found in the books where non-arrival has been relied on to prove a loss by perils of the sea, the plaintiff went one step further, and proved that the ship had never been heard of after a certain period, and then it was held that, inasmuch as if the crew had survived they would probably have given some tidings of the vessel, it was to be presumed that the vessel and all on board perished at sea. *Green v. Brown*, 2 Str. 1199, *Newby v. Read*, Park Ins. 106, *Twenlow v. Oswin*, 2 Camp. 85 (11 R. R. 670), *Houston v. Thornton*, Holt, N. P. 242 (17 R. R. 632), all proceeded upon this ground; in each of them it was proved that the vessel had never been heard of; and the *Ordonnance de la Marine*, Liv. 3, T. 6, des Assurances, art. 58, is to the same effect: “Si l’assuré ne reçoit aucune nouvelle de son navire, il pourra, après l’an expiré, (à compter du jour du départ pour les voyages ordinaires,) et après deux ans (pour ceux de long cours), faire son délaissement aux assureurs, et leur demander paiement, sans qu’il soit besoin d’aucune attestation de la perte.” Valin, in his commentary on this article, after observing that the same rule is laid down in Guidon and other books, observes, that the assured cannot abandon

[\* 21] if the assurers or any third persons have within the specified time received intelligence of the vessel. See Valin’s

Commentary, Rochelle edit., 1766, vol. ii. p. 141. But, secondly, the evidence of the witness, who said he heard of the loss, and that the crew survived, must be taken into consideration. The plaintiff tendered it, and it was not objected to; the defendant, therefore, is entitled to the benefit of it now, especially as the LORD CHIEF JUSTICE left it to the consideration of the jury. It must be taken then that the crew survived the loss of the vessel, and, that fact having been established, the plaintiff was bound to call some of them, or to account for their absence, he did not otherwise give the best evidence that the nature of the case admitted, and the evidence which he had before given ought not, under such circumstances, to have been left to the jury. *Williams v. East*

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*India Company*, 3 East, 192 (6 R. R. 589). In Bull. N. P. 293, it is stated as the first general rule of evidence, that the party must give the best evidence that the nature of the thing is capable of.<sup>1</sup>

ABBOTT, Ch. J.—The only question is, whether in this case there was sufficient to be left to the jury as evidence of a loss by perils of the sea or by barratry? The defendants now contend that the plaintiff should have proved that which it was impossible for him to do, viz. that the ship had never been heard of, for she had been heard of, and the account received was that she foundered at sea. The evidence given at the trial was, that the vessel, with the goods insured on board, sailed from Leghorn in April 1821, for Lisbon, \* that she never arrived at that place, [\*22] and that a few days after her departure from Leghorn the witness heard that she had foundered at sea, but that the crew were saved. Taking the whole of that account together, it proved a loss by perils of the sea, but we are asked to take half of it only, viz. that the crew survived; and to exclude from our consideration that which related to the loss of the ship. I think we should not be justified in so doing, and that it is impossible for us to say that at this distance of time it was incumbent on the plaintiff to send all over Europe in search of the crew of this vessel, whom we must suppose to have been foreigners, the ship being foreign, and trading between foreign ports. For these reasons, it appears to me that there was sufficient evidence to be left to the jury, and that the verdict ought not to be disturbed.

BAYLEY, J.—I am of the same opinion. When it is said that a ship has not been heard of, I take that to mean that no intelligence has been received from persons capable of giving an authentic account; and not that mere rumours have never been heard. In that sense the vessel in question had never been heard of. But although such evidence has frequently been given, it cannot in all cases be essential. In the present case the plaintiff was owner of the goods, not of the vessel, and the underwriters might have just as good means of inquiring about the crew as the plaintiff had.

<sup>1</sup> See the observations upon this rule in Stark. on Ev. 389, and particularly upon the case of *Williams v. E. I. Company*, which seems to have occasioned some apprehension as to the nature and extent of the rule. The expression used

in Bac. Abr. Evidence (I), that “the law requires the highest proof the nature of the thing is capable of,” appears to be more appropriate, and less liable to misconstruction than best evidence.

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Why then is it not as reasonable to call upon them to prove affirmatively that intelligence of the ship had been received, as upon the plaintiff to prove the negative? In the absence of any such evidence, I think it was fair to presume that the ship perished at sea.

[\*23] \* HOLROYD, J.—I think there was sufficient *prima facie* evidence of a loss by perils of the sea, and it was just as reasonable to expect the defendants to give evidence to rebut that, as to call upon the plaintiff for evidence in confirmation.

LITTLEDALE, J., concurred.

*Rule refused.*

## ENGLISH NOTES.

*Twemlow v. Oswin* (1809), 2 Camp. 85, 11 R. R. 670, cited in the argument of the principal case, was the case of an outward-bound ship, which sailed from Liverpool on the 14th April, 1807. At the trial on 1st March, 1809, a clerk in the plaintiff's shipping-office swore that the ship had not been heard of. Sir James MANSFIELD, Ch. J., held this was evidence to go to a jury of the loss of the vessel before reaching her port of destination.

There must be some evidence that the ship sailed on the voyage insured. It is enough for this purpose to show the destination by charter-party, or by any document from which the inference may be drawn that the captain was furnished with papers for that voyage according to the practice of the custom-house. *Cohen v. Hinckley* (1809), 2 Camp. 51, 11 R. R. 660.

## AMERICAN NOTES.

This case is cited in 1 Parsons on Marine Insurance, p. 545, and its doctrine is there approved, and is sustained by *Brown v. Neilson*, 1 Caines (N. Y.), 525; *Gordon v. Bowne*, 2 Johnson (N. Y.), 150 (KENT, Ch. J.); *Ruan v. Gardner*, 1 Washington (U. S. Circ. Ct.), 145 (taken by privateer and not heard of for three years); *Paddock v. Franklin Ins. Co.*, 11 Pickering (Mass.), 227. In the last case, SHAW, Ch. J., said: "Where a vessel has sailed, apparently in a seaworthy condition, and never been heard from, as such an event is of rare occurrence, and the extraordinary perils and dangers to which she is exposed are very great, the law, in the absence of other proof, will presume that the loss was occasioned by some of those perils." But otherwise (he continues) if the officers and crew are saved and give a different account. In *Merritt v. Thompson*, 1 Hilton (N. Y. Com. Pl.), 550, a vessel sailing on a voyage, ordinarily taking four months, was not heard of, nor was her crew, in seventeen, and it was held that it must be presumed that she was lost. The same principle in *Oppenheim v. Wolf*, 3 Sandford Chancery (N. Y.), 571, the case of the first Transatlantic steamship, *President*; and so in *White v. Mann*, 26 Maine, 363; *Gerry v. Post*, 13 Howard Practice Rep. (N. Y.) 118.

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No. 81.—*Taylor v. Curtis*, 6 Taunt. 608.—Rule.

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## SECTION IX.—*Abandonment and Total Loss.*

See “ABANDONMENT,” 1 R. C. 1-155.

## SECTION X.—*General Average Loss.*

No. 81.—TAYLOR *v.* CURTIS.

(C. P. 1816.)

No. 82.—THE BONA. ENGLISH AND AMERICAN SHIPPING COMPANY *v.* INDEMNITY MUTUAL MARINE INSURANCE COMPANY.

(C. A. ADM. 1895.)

### RULE.

LOSSES incurred by reason of the master having done what was his plain duty as part of the adventure are not, by English law, accounted as general average.

But where, under stress of extraordinary and unforeseen circumstances, a sacrifice of some part of the adventure is deliberately made for the benefit of the rest, the loss so incurred is a general average loss.

### *Taylor and others v. Curtis.*

6 Taunton, 608-625 (16 R. R. 686).

#### *Insurance.—General Average.—Resistance to Capture by Privateer.*

The expenditure of ammunition, in resisting capture by a privateer, [608] the damage done to the ship in the combat, and the expense of curing the wounded sailors, are not the subject of general average by the law of England.

The plaintiffs declared that they were owners of the ship *Hibernia*, which was proceeding upon a voyage from this kingdom to the island of St. Thomas with a cargo of merchandise upon freight, and that upon the voyage she was attacked by enemies, viz. by persons acting under the authority of the government of the

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United States of North America, who endeavoured to make prize of the ship and cargo, which the master and crew resisted, and thereby, and in the proper and necessary defence of the ship and cargo by the master and crew against those enemies, and in endeavouring to preserve the same from capture, the ship and her furniture were greatly damaged, and the plaintiffs necessarily and properly expended a large sum in repairing the damage: that the ship and cargo were by such resistance and defence preserved from capture, and afterwards completed her voyage: that when the ship was so attacked, and the damage and expense so occasioned and during the voyage, the defendant was the owner of a part of the goods on board of value, and was benefited in respect thereof by the resistance against the attack, and the defence of the ship and cargo, from which the damage and expense accrued, by reason whereof the defendant, as the owner of such part of the goods, became liable to contribute to that damage and expense in a general average; and in consideration thereof promised to pay so much as he, as such owner, was liable to contribute. The second count stated more generally, that in endeavouring to preserve the ship and cargo from capture, the ship and furniture were greatly damaged,

and great loss and expense were necessarily and properly incurred. The 3d count stated, \* that on the voyage

[\* 609] a part of the ship's furniture, of value, was utterly lost, and other part sustained damage, which loss and damage were occasioned by acts of the master and crew of the ship, properly and necessarily done by them in order to preserve the ship and cargo from capture by enemies, and being thereby wholly lost to the owners thereof, the ship and cargo were, by the means so used for the general preservation, preserved from capture, and afterwards completed the voyage: that he was during the time that cargo was on board, and of the loss and damage, the owner of a part of the cargo, of value; that he was benefited in respect thereof by those acts of the master and crew; and by reason thereof became liable to contribute to that loss and damage in a general average, and promised to pay, and they averred his proportion, and notice. The 4th count was *indebitatus assumpsit*, for general average payable upon and in respect of merchandises of the defendant, carried in the plaintiffs' ship the *Hibernia*, from this kingdom to parts beyond the seas. The cause was tried at Guildhall, at the sittings after Michaelmas Term, 1816, principally on admissions, and it

No. 81.—*Taylor v. Curtis*, 6 *Taunt.* 609, 610.

appeared that the plaintiffs were owners of the *Hibernia*, of 6 guns and 22 men. The defendant was proprietor of goods loaded on board that ship for a voyage from London to St. Thomas; in the course of which the ship was attacked by an American privateer, of 22 guns and 125 men, then hostile; the captain and crew resisted the attack for nine hours, in the course of which the American was thrice compelled to sheer off, and as often returned to the combat, but the *Hibernia* ultimately disabled and beat her off, with the loss of two of the *Hibernia*'s men killed and several wounded, proceeded to her port of destination, and delivered her cargo in safety to the consignees. The *Hibernia* sustained considerable damage in the engagement, \* both in her hull [\* 610] and rigging, which were repaired at a considerable expense to the owners. The owners also incurred a further expense in providing medical and surgical assistance for the wounded mariners, and expended in the engagement a considerable quantity of gunpowder and shot, part of the stores and outfit of the ship, and now sued to try the question whether the defendant were liable, in respect of his part of the cargo, to contribute to these expenses as general average. The jury found a verdict for the defendant, subject to a reference as to the amount, but liberty was reserved to the plaintiffs to move to set aside the verdict, and enter a verdict for the plaintiffs.

Lens, Serjt., in Hilary Term accordingly moved.

GIBBS, Ch. J., inclined to grant a rule *nisi*, because two books of high estimation in the profession, but not at present to be cited as authority,<sup>1</sup> state, that damage sustained in defending the ship, and the healing the wounds of the sailors hurt in a combat, is general average (Park on Insurance, 6th ed. vol. i. p. 173; Marsh. on Insur., 2d ed. vol. ii. p. 535); they cite no authority. Another treatise (Abbott on Merchant Shipping, 4th ed. p. 366) also, by an author of high character, observes that there is no authority for this position; that foreign writers differ; that if a ball passes through a bale of goods, the damage rests where it falls; and if so, why is a ball passing through a ship's side to be general average?

*Rule nisi.*

<sup>1</sup> *Lens, arguendo.* Books of living authors are not usually to be cited yet there are such extant which in future time (may that period be long distant!) will be

cited as of equal authority with Emerigon and Le Guindon. *Laudari nihil est nisi ab laudato viro.*

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Shepherd, Solicitor-General, and Best and Bosanquet, [\* 611] Serjts., showed cause against this rule. The \* plaintiffs raised their demand on three distinct subjects of damage: first, for the damage done to the hull and rigging of the ship; second, for medical and surgical aid to the mariners wounded in the conflict; third, for ammunition, part of the ship's stores, expended in the engagement. They denied that the plaintiffs were entitled to recover a contribution by the defendant to either of these subjects of loss. There was no evidence in the case of any special custom of merchants to consider these as general average, although a wise policy might frequently have induced individuals to contribute to similar losses. Nor was there any positive ordinance on the subject in the English maritime law. The authorities on the point were very few; there were only three decided cases in the English law which bore on it. *Birkley v. Presgrave*, 1 East, 220 (6 R. R. 256), *Corington v. Roberts*, 2 Bos. & P. (N. R.) 378 (9 R. R. 669), and *Power v. Whitmore*, 4 M. & S. 141 (16 R. R. 416). In the case of *Birkley v. Presgrave*, a cable and anchor was let go in the river Thames, and for saving the ship it became necessary to cut the cable. The act of cutting the cable was a voluntary deliberate act (which is the distinction taken by Emerigon) for preserving the residue; therefore the case is not applicable; in *Power v. Whitmore*, wherein the Court, apparently on better consideration, completely overruled what they had held in *Plummer v. Wildman*, 3 M. & S. 482 (16 R. R. 334), it was held that where a ship, having suffered in heavy gales, put into port to repair, the wages and provisions of the mariners while she was in port, and the pilotage, and other port charges, and the expenses of her repairs there, were not general average. In *Corington v. Roberts* a ship had struck to a privateer, but the latter could not take possession; the ship therefore crowded sail, and in so doing strained her masts, [\* 612] opened her seams, and carried away \* her mainmast, but escaped; and it was contended this was general average because the master used such a press of sail in a gale of wind, as he could not have justified in the ordinary course of navigation. Yet it was held to be only a common sea-risk, although it was voluntary, and a matter of judgment, on his part, and it was his duty to do so. So here: the ship is attacked by a privateer; if she can resist, it is the captain's duty so to do; for so doing, he must exercise the means; in that act he expends his powder and ball, but

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it is not like the throwing goods overboard; he uses it for the very purpose for which he carries it out. If in a dark night he fires signals of distress, there is an expenditure of the ship's powder on an extraordinary occasion to relieve himself from impending distress, but though it is out of the ordinary course of navigation, he only yields to the necessity created by a peril of the sea, of exerting himself to do that duty. The crowding sail and losing a mast, and the receiving the shot of an enemy, are both consequential on the exertion of escaping the impending evil, yet they are equally voluntary as the expenditure of powder in the combat. The rule as to general average is, that, unless there is a voluntary devotion of some part, it does not constitute general average; if there be that devotion, it entitles him who is the author of that devotion to general average, but if the ship does not go out of the usual duties, course, and practice of her voyage for that purpose, it is not general average. If a ship be attacked by an enemy in the course of her voyage, it is as much a part of the duty of the captain and crew to defend the ship, as it is to pump her if she springs a leak. If in pumping, they broke the pump, that damage would not be called general average. Nothing which does not fall within the ordinary course and duties of the voyage is to be found here. There being then no positive law on the \* subject in [\* 613] England, how has the subject been treated by writers on general law? The law merchant, indeed, is the law of the civilized world, and the Court would defer to foreign writers on this subject as authorities of weight; but such passages as were found in text writers relevant to the question, rather treated of the positive ordinances of particular countries, than illustrated the general law. And though the latter might in many instances re-enact that which was a principle of general law, they did not necessarily or always agree therewith. But so far as they go, the current of the authorities shows that the general law is in favour of the defendant. *Dig. lib. 14, tit. 2, pl. 1, De Legi Rhodiâ de jacta:* “*Lege Rhodiâ cavetur, ut si levandae navis gratiâ jactus mercium factus est, omnium contributione sarciantur, quod pro omnibus datum est;*” pointing at the voluntary character of the sacrifice made for the preservation of the whole. And again (*ibid.*): “*Si conservatis mercibus, deterior facta sit navis, aut si quid exarmaverit, nulla facienda est collatio, quia dissimilis earum rerum causa sit, quæ navis gratiâ parentur, et earum pro quibus mercedem aliquis*

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aceperit, nam et si faber incudem aut malleum fregerit, non imputaretur ei qui locaverit opus, sed si voluntate vectorum vel propter aliquem metum id detrimentum factum sit, hoc ipsum sarciri oportet." So Cleiracq (*Us et Coutumes de la Mer; Jugemens d'Oleron*, p. 50. s. 5): "La contribution doit estre des dommages faits *ad intra*, que ceux qui sont dans len aviré ont deliberé, qu'ils ont faite et executé par eux mesmes. Mais ce qui vient de dehors, *ad extra*, comme le dommage causé par les vents, par la tempeste, ou le foudre, ou par les Pillars, c'est tout avarie simple, qui n'entre pas en contribution." Wisbuy, article 12. Valin, indeed, in his

work on the ordinances of the Hans towns (tom. 2, liv. 3, [\* 614] tit. 7, Des Avaries, art. 6), enumerates \* among other heads, average which arises in defending the ship; and gives the ordinance of the Hans towns, that the expense of the cure is general average: "En combattant pour eviter d'être pris par l'ennemi, sans distinguer en ce cas, si le matelot et blessé les armes à la main, ou s'il n'est qu'en faisant la manœuvre. Mais s'il est blessé hors le combat en faisant la service et la manœuvre ordinaire, les frais de ses pansements & nourriture ne peuvent passer pour avaries communes, attendu qu'il n'a pas reçu sa blessure pour le salut commune." Here, however, he is not speaking of the common law of Europe, but of the ordinances of France and Hamburgh. So, in speaking of the French ordinances (p. 165, art. 6), he says, that the wounds of sailors shall be general average. Pothier also, in his *Traité des Avaries* (ii. 421), is speaking of specific ordinances, and says, that where the ordinance is that the cure of a wounded sailor is general average, there the cure of a wounded passenger is also general average. Emerigon (p. 627, c. 12, *Enumeration des Avaries grosses et des avaries simples*, s. 41, n. 8) says, "If the captain throw goods overboard, or do any other voluntary and necessary act, *ab intra*, which occasions a beneficial sacrifice, such loss shall be general average. Mais si pendant qu'on est engagé dans ce mauvais pas, on souffre de dehors quelque dommage, soit par la force de la tempête, soit par le talonage sur le roe, soit par la canon de l'ennemi, un pareil dommage est avarie simple, parce qu'il est purement fatal," i. e. irremediable, it must rest where it falls, as a casual or simple loss; and in a former passage, he says, that the meeting with an enemy is a sea risk, [\* 615] in like manner as a rock or a storm. \* Though Emerigon here seems to differ from Valin, yet they are reconcilable.

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In a subsequent sentence he quotes Le Guidon, which puts in the rank of simple averages all loss sustained from bad weather, or making water, being struck by cannon shot, or boarded by pirates.<sup>1</sup> In the Hans towns and France there are particular ordinances. In the former, “Si<sup>2</sup> quis nautarum contra pirates strenuè dimicaverit, et in conflictu fortè debilitatem membrorum passus sit, is sanari et in æqualem contributionem ex navi et bonis præstandum venire debet. Et si ad tantam debilitatem pervenerit, ut sibi de victu ampliæ providere nequeat, tunc ad dies vitæ ille de alimentatione liberâ propiciatur, aut alia æqua donatio pro qualitate rei hoc nomine ei offeratur.” By the ordinance of Louis XIV. (Ordonnance de Louis XIV., tit. 7, Des Avaries, art. 6), “Les pansemens et nourriture du matelot blessé en defendant le navire, sont avaries grosses ou communes.” There being this particular ordinance for wounds of seamen, but none for the wounds of the ship, the two learned writers, Valin and Emerigon, inquire whether it extends to damage done to the ship. Valin, as an inference rising from the ordinance for the wounds of sailors, concludes (Valin, tom. 2, liv. 5, art. 6, *ad finem*, p. 167), first confessing all writers are against him, that it does: but he draws another conclusion contrary to the English law, for he puts the very case of *\*Corington v. Roberts*,<sup>3</sup> and decides it contrary to [\* 616] the decision of this court; so that, from the beginning to the end, Valin, it appears, was proceeding on a ground contrary to this Court. Emerigon holds the opposite opinion, and says that he so decided as a judge in the French Court of Admiralty. But in both writers, this is only an inference, with respect to the ship, drawn from the French ordinance. In the ordinances of the Hans towns, there is, in like manner, a provision respecting wounded sailors, but none respecting wounds of the ship, and another writer concurs in inferring thence, that it extends not to the ship. Kuricke (tit. 14, art. 3, p. 73) on the Hanseatic law, who

<sup>1</sup> “Avarie qui concerne la marchandise est empirance, pourriture, dégât, mouillement d'eau, racourrage, visitation & appretiation, sauvages, & autres semblables choses, si elles procedent par fortune de mer, mauvais temps, ou pour avoir le navire fait eau, touché, abordé pour les Pillars, tiré à coups de canon, le tout fait attester & apprecié.” Guidon de la Mer, Des Avaries, chap. v. s. 4.

<sup>2</sup> Kuricke, Jus Maritimum Hanseaticum, Titulus 14. De extraordinariâ remuneratione fidelium nautarum, Articulus 13.

<sup>3</sup> “Sera demême avarie commune, si faisant force de voiles pour se sauver de la prise, les mâts se rompent, les voiles & cordages sont emportés,” &c. Art. 21 du ch. 5, Du Guidon. 2 Valin, Comment. 166, 167.

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is cited by Emerigon (tom. i. p. 628), says, "armamenta tamen navis et instrumenta in conflictu cum piratis depravata in havariam non veniunt, sed damnum hoc a nauclero et exercitoribus sacerendum est," for which he cites a judgment in the Court of Dantzie, 1603, 24 Sept., *Plassenbury and others v. Dumerau and others*. The cure of the wounds of sailors never could be general average by the law of England, because the statute 11 & 12 Will. III., c. 7, s. 11, gives them retribution in another way, by giving power to levy on the owners a sum not exceeding two per cent on the value of the freight, ship, and cargo. If it had been average in an ordinary way, there would have been no need of these retrIBUTions. So, out of the wages of merchantmen, a deduction of sixpence per month is made to provide for hospitals.

Lens and Copley, Serjts., in support of the rule. — It being habitual with merchants to treat losses of this description as general [617] averages, it may fairly be inferred that the law is such.

This case falls within the principles which have been laid down on the other side. The defence of the ship was a voluntary undertaking to do that on behalf of the ship which should be for the benefit of the whole concern. To the argument, that defence is a duty, and so this loss not a general average, it may be first answered, that this is not a question between the mariners and the owner of the ship, but between the owners of one sort of property and the owners of another. But further, although it is the duty of the crew to obey the master, no law compels the master universally to fight, but only certain persons, and in certain specified cases. It is not such a part of the public duty of the master and mariners, that it can be considered as a matter of course that they should enter into the defence of the vessel against such an immense disparity of force; it is no part of their contract, though they deserve high commendation for defending: whatever risk is incurred on this deliberation of the master and men, it is a voluntary sacrifice made by persons who might have abstained from it, if they had thought proper; it is a sacrifice made for the good of the whole, and it proved productive of that good. They did not expend their ammunition for the particular benefit of any part which has remained to themselves alone. The definition of a general average requires that it should be a voluntary sacrifice; but how far is it to be voluntary? Not absolutely so. In cutting away a mast to preserve the ship, you give away that which would be inevitably

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lost with the rest, if it were not given; so here, all would have been taken, but for this voluntary act of fighting. The ship falls in with an enemy, the master deliberates. “If I fight, I shall incur expense in healing the wounded sailors, I shall expend my ammunition, and receive damage to my vessel, but I probably shall save something; and if I do not fight, I assuredly shall lose [618] the whole.” This then is clearly a voluntary and deliberate sacrifice of a part for the sake of preserving the rest: it is, 1st, deliberate; 2ndly, it is the sacrifice of a part; 3rdly, the object and effect of it is to preserve the rest; 4thly, it is *ab intra*, and voluntary. All the required qualities here concur. In *Birkley v. Presgrave*, Lord KENYON, Ch. J., says, all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average: it is not straining the case to say this was an expenditure out of the common course. LAWRENCE, J., translates the definition of Pothier: he says, that all loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested; and that natural justice requires this. Suppose a ship, for the purpose of avoiding an enemy, runs down another vessel, as is sometimes done, by which the first vessel is injured, that is clearly general average. Will the Court then entertain the nice distinction, that the one way of fighting a vessel is general average, the other not? The only other cases in our common-law books not before cited are those of *Da Costa v. Newnham*, 2 T. R. 407, wherein wages and expenses of unshipping a cargo, where the ship had put into port for the general safety, are by BULLER, J., considered as general average, and *Plummer v. Wildman*, which is to the same effect: the charges of repairs, powder and shot expended, and the cure of seamen, are in like manner for the benefit of the whole concern. The doctrine of MANSFIELD, Ch. J., in *Covington v. Roberts*, that it was only a common sea risk to put up an [619] unusual press of sail does not operate against the plaintiff; that certainly was a common sea risk, but this is not such an one. A common sea risk is that which does not require the deliberation of the party to determine whether it shall be incurred or not. A case which goes to illustrate the general principle is that of the

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*Copenhagen*, 1 Robins, 294, where a question arose concerning the expense of transshipping goods. Sir W. SCOTT, J., says, "General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both, and therefore the expense of that transhipment, or rather of the unloading, seemed to have upon it the character of a general average." That doctrine is applicable to the present case. This is an act done in the hope of saving the ship from a loss which would otherwise be inevitable. This being a voluntary act, as far as any of the actors are concerned, must be general average. The stat. Will. III., for encouraging seamen to defend the ship, applies not to this case; it does not profess to inquire whether the seamen were entitled to any other compensation or not. Neither does it apply to wounded sailors merely, but it is for giving a reward to the master and the crew generally, as well as to the wounded. Nor is the instance of seamen contributing to hospitals at all analogous. Therefore the matter is left much at large, to be considered on principle. It is not true that the writers on general law all draw a conclusion in favour of the defendant. The passage in the Rhodian law, on which all the authorities found themselves, is highly favourable to the plaintiff, where *jactus mercium* is put only as the instance. In *Dobson v. Wilson*, 3 Camp. 486 (14 R. R. 817), Lord ELLENBOROUGH, [620] Ch. J., acknowledges that a jettison to lighten the ship is not

the only foundation of general average, but it must arise from that, or something analogous. The defendant does not contend that it is literally confined to a *jactus mercium*. This is, in the very terms of the Rhodian law, *pro omnibus datum*. The ammunition would not have been destroyed, more than the rest; it would all have been captured together, unless for this exertion against the enemy. Valin says, that the damage sustained by the ship and part of the cargo, in fighting to avoid being taken, and the expense of curing the wounded sailors, are the subject of general average. It is said that Valin and other foreign jurists are of little authority on this point, but the more the objection to them, drawn from the assertion that they are treating only of the ordinances of particular countries, is examined, to the less weight will it be found entitled. Valin is not a mere commentator on the French ordinances, his work was intended as a commentary on the general law of Europe; it is known that the ordinance of Louis XIV. was a code compiled from

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the laws of all Europe, by order of that monarch; and the plaintiff takes his stand farther back than Valin, and says that ordinance itself is an authority. Valin (tom. 2, liv. 3, tit. 7, art. 6) does not say that the repairs of the ship are, by parity of reasoning from the instance of the cure of the wounded sailors, general average, as is supposed on the other side: he puts several instances, and says, that the repairs of the ship are substantively one subject of general average, though Kuricke, Casa Regis, and Carlo Targa are of a different opinion as to the repairs of the ship. Pothier (tom. 2, partie 2, s. 2, art. 144, p. 422), and a greater authority could not be cited, agrees with Valin. Kuricke, in his commentary on the third article of the fourteenth title of the *Jus Maritimum Hanseaticum*, cited above, expressly guards against the idea, that he was [621] stating this as the law of the Hans towns only, and he lays it down as the public and common law of all civilized Europe (p. 246). He says, “Hinc est, quod etsi corpora libera in estimationem et contributionem non veniant, [De Jure Civili, l. 2, s. 2, ad l. Rhod. de jaet.] nihilominus communiter de jure maritimo statuatur, quod si quis nautarum in pugna cum hostibus vel piratis vulneratus, debilitatus, aut occisus fuerit, tum id quod interest, seu damnum ex vulneratione, debilitatione, aut nece, resultans, ac porro tota merces, prætensio, vectibilia, et sepultura defuneti, in grossam Havariam, et communem contributionem ex navi et mercibus, pro quarum defensione tot malorum passus est, præstandam veniat:” and he cites for it four different codes. *Jus Marit.*, Carol. art. 28, Philip II. tit. de Naufrag., art. 2, *Jus Danic.*, c. 20, and *Statut. Hamburg*, part 2, tit. 14, art. 42. Emerigon says, it is true, that the meeting an enemy is a peril of the sea, and the subject of particular average only. A loss occasioned by an hostile ship firing on the vessel, before she had time to surrender, or a shot fired after her surrender, would certainly be a peril of the sea; but this is not that case, this is a loss occasioned by the voluntary act of the master and crew, this is not fatal; there is no inevitable necessity. The passage Emerigon cites from Le Guidon does not necessarily suppose an engagement: it even seems not to contemplate an engagement: he speaks of a ship making water, boarded by robbers, receiving a shot (*tiré à coup de canon*), which may be in a pursuit, or in order to bring her to; it does not appear that the author's attention was drawn to this case of an engagement, and of wounds received by the ship in her defence. But Emerigon (c. 12, s. 41, division 16, p. 636, tit. in

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marg. Matelots Blessés) and the French ordinance, and the [622] Hans towns ordinances, and also Cleiracq, a great authority on this point, and Vinnius, all of whom he cites, all concur as to damage done to the sailors, and only differ as to the damage done to the vessel. Cleiracq, in his commentary on the judgments pronounced on the laws of Oleron (Cleiracq, Us et Coutumes de la Mer, art. 6, pl. 3, p. 31), says, "Et si en se defendant, ou combatant contre l'ennemy ou less fourbans, il est mutilé, ou rendu purelus et inhabile a travailler le reste de sa vie, il aura du pain tant qu'il vivra, aux depens du navire et de la cargaison, et c'est avarie grosse," and he cites Hanze Theut., art. 35; Charles Quint, art. 27 & 28, Arg. legis secundum Julianum et ibi Barth. et I. cum duobus ss. quidam D. pro socio; and the following passage from Grotius: "In societate navalii adversus piratas utilitas communis est ipsa defensio. Solent estimari naves, et quae in navi sunt, atque ex his summa confici, ut damna que eveniunt, in quibus sunt et vulneratorum impendia, ferantur a dominis navium et mercium pro parte quam habent in eâ summâ. Et hæc quidem, quæ diximus hactenus, ipsi juri naturæ sunt consentanea." (Grot. De Jur. Bell. et Pacis, lib. 2, c. 12, s. 25.) Grotius here is speaking on the head of contracts, and says that, where no contract subsists, the question ought to be decided by natural justice and natural law. This is a strong confirmation. This and the laws of the Hans towns are cited, because they are a commentary on the system, the opinions of legislatures on the question. So, a writer of our own country says: "All extraordinary charges, proceeding from endeavours to preserve the ship and cargo, and the damages resulting from the measure taken for that purpose, constitute and are commonly accounted, a general or gross average, as the ordinance of Hamburgh explains it (No. 981), of which expenses and damages that ordinance [623] (No. 983) particularly enumerates: 1, all damage that a ship suffers in her apparel and cargo, in defending her against an enemy, privateer, or pirate; 5, what may be expended in the cure and extraordinary attendance on either officers or sailors, wounded in defence of the ship; and also, what rewards may be promised by articles to the widows and children of those who may unfortunately lose their lives in the engagement; 6, the extraordinary gratuity which a master may have promised his men, to animate them to a stout defence, or salvage of the vessel" (Magens on Insurances, vol. i. p. 64, s. 57.) Magens adopts this doctrine as

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an ordinance of Hamburgh; it is, therefore, as well the opinion of Magens, as of an eminent civilized country. So another author, (Treatise on the Dominion of the Sea, 1724, p. 93.) commenting on the 9th article of the laws of Oleron, saith, “And in the same manner it is ordained to make an equal contribution for damages sustained by rovers and pirates;” [which must necessarily mean in the defence, as all writers agree that goods captured by pirates are not the subject of contribution ;] “the good design of which law is, to excite every individual mariner and other person in the ship to do his duty, to which the consideration and apprehension of his own particular risk will not a little contribute.” The several parts of this case must be divided, and it is extraordinary that the legislature of Hamburgh made this ordinance contrary to the decision cited by Kuricke respecting damage to the ship. Emerigon himself, though he denies that the damage to the ship is general average, yet has a separate section in which he calls *matelots blessés* general average. Not a single writer says that seamen’s wounds are not general average. As for the expenditure of powder, it comes literally within the term *jactus*: it is thrown overboard, and it is so disposed of for the benefit of others: it is [624] equally voluntary, as the throwing over of goods for lightening the ship.

*Cur. adv. vult.*

GIBBS, Ch. J., on this day, after stating the pleadings and the evidence, now delivered the judgment of the Court. The question in this case is, whether the articles on which the plaintiffs seek to recover do or do not fall under the denomination of general average, as it is understood by merchants in this country. The doctrine of general average has its origin in the Rhodian law, “ut si levanda navis gratiâ jactus mercium factus est, omnium contributione sarcitur, quod pro omnibus datum est.” Different countries of Europe have made different regulations, all professing to be founded on the Rhodian law, and differing from each other. The commentators on them have also differed. We have no such regulations in this country, and must therefore expound the law, as it affects this question, upon principle. The losses for which the plaintiffs seek to recover this contribution, are of three descriptions: 1st, the damage sustained by the hull and rigging of the vessel, and the cost of her repairs; 2ndly, the expense of the cure of the wounds received by the crew in defending the vessel; 3rdly, the expenditure of

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powder and shot in the engagement. Nothing in foreign jurists ought to govern our judgment on these points, unless they have been sanctioned by received principles, decided cases, or the general usage of merchants. But we find none of these lights that might guide us. We have been so long involved in war, that similar circumstances must have been of general occurrence, and similar claims would have been made on the one side, and allowed and submitted to on the other, if they were founded in law: but [625] this has not been the case, these losses must therefore be taken not to fall within the description of general average. If, however, it came within the principle, it would equally be due to the plaintiffs, though this were the first instance in which the claim had been preferred. The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there, it seems to me, they ought to rest. It therefore follows, that these losses were not of the nature of general average, and that the plaintiffs cannot recover.

*The rule therefore must be discharged.*

**The Bona. English and American Shipping Company v. Indemnity Mutual Marine Insurance Company.**

64 L. J. P. D. & A. 62-64 (s. c. 1895, P. 125; 71 L. T. 870; 43 W. R. 290).

*Insurance. — General Average. — Ship stranded. — Cost of extra Coal used.*

[62] By a policy of insurance effected by the plaintiffs with the defendants, the plaintiffs as owners of the steamship *Bona* caused to be insured the hull and machinery of the vessel against the ordinary marine risks, including payment of general average charges. In the course of a voyage the ship stranded, but after a lapse of three days was got off by means of her engines, which were damaged by reason of the unusual strain to which they were subjected. A quantity of coal was consumed in working the engines for the above purpose. Held, (affirming the decision of the PRESIDENT, Sir F. JEUNE,) that the plaintiffs were entitled to general average both in respect of damage caused to the engines and of the value of the coal so consumed.

*Appeal from a decision of the PRESIDENT (Sir F. JEUNE).*

The agreed statement of facts was as follows:—

By a time policy of insurance dated the 4th day of March, 1892, effected by the plaintiffs, the owners of the steamship *Bona*,

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with the defendants, the Indemnity Mutual Insurance Company (Limited), the plaintiffs caused to be insured the hull and machinery, &c., of the steamship, valued at £25,000, in the sum of £3000 against the ordinary marine risks, including general average, for the space of twelve months from the 9th of March, 1892.

On or about the 11th of January, 1893, whilst the steamship was in the course of a voyage from Galveston to Liverpool, laden with a cargo of cotton and flour in bags, under a bill of lading dated the 7th of January, 1893, she stranded upon Galveston Bar (without any negligence on the part of those on board the steamship), and remained on the bar until the 14th of January, and was exposed in the mean time to the action of strong currents, and by reason of the state of the wind and sea the said steamship strained and vibrated heavily from time to time, and repeatedly struck the ground with great force, causing her iron decks to work and undulate. During the worst of the weather, between the 11th and the 14th of January, seas swept right over the steamship's decks, and she was in a position of considerable risk and danger.

While the steamship lay stranded on the bar, her engines were from time to time properly employed in the attempt to get her off the bar into deeper water. With this end in view, the engines were worked ahead and astern as required, steam being constantly maintained, and in consequence of the working of the engines they were put to unusual strain, and a considerable amount of damage was sustained in working them under the circumstances aforesaid. By means of the engines, and by reason of a considerable lightening of the steamship, she came off about midday on the 14th of January, and was subsequently anchored in Bolmer Roads, Galveston, and there surveyed. The *Bona* afterwards proceeded to Liverpool with her cargo, and was there repaired.

The repairs to the hull of the steamship rendered necessary by the said stranding were effected at a cost of £2878 8s. 3d., and the like repairs to the engines and machinery were effected at a cost of £356 11s. 2d. The defendants paid their proportions of these amounts in particular and general average, as assessed in the average statement. The damage sustained by the engines and machinery was apportioned as follows: general average, £273 16s. 4d.; ship £82 14s. 10d.; and the defendants have paid their proportions of these several amounts. They do not, however,

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admit that the working of the engines under the circumstances hereinbefore set forth gave rise to general average.

About fifty-two tons of coal were burnt in working the engines during the time they were being used in the attempt to get [\* 63] and in getting the said steamship \* off the ground. The value of that coal has been agreed at 390 dollars. On behalf of the plaintiffs, it is contended that the damage sustained by the engines was a general average loss, and that the value of the coal burnt, as above mentioned, should, on the same principle, be contributed to in general average. The defendants contend that the value of the coal is not the subject of general average.

The question for the determination of the Court was whether the defendants were liable as such insurers to pay under the policy the value of the fifty-two tons of coal as general average.

The PRESIDENT (Sir F. JEUNE) held that the defendants were liable to a general average contribution in respect of the coal.

The defendants appealed.

Joseph Walton, Q. C., and T. G. Carver, for the appellants.

Sir R. E. Webster, Q. C., and H. Holman, for the respondents.

The arguments sufficiently appear from the judgments.

[The following cases were cited: *Covington v. Roberts*, 2 Bos. & P. (N. R.) 378 (9 R. R. 669); *Power v. Whitmore*, 4 M. & S. 141 (16 R. R. 416); *Birkley v. Presgrave*, 1 East, 220 (6 R. R. 256); *Wilson v. The Bank of Victoria*, 36 L. J. Q. B. 89, L. R. 2 Q. B. 203; *Harrison v. The Bank of Australasia*, 41 L. J. Ex. 36, L. R. 7 Ex. 39; *Hullett v. Wigram*, 9 C. B. 580; and *Robinson v. Price*, 46 L. J. Q. B. 551, 2 Q. B. D. 295. The following authorities were also referred to: Arnould on Insurance (2nd ed.), p. 901; Benecke on Indemnity, pp. 183–189.]

Lord ESHER, M. R.—The question here is confined to the matter of the coals, but I agree that the point as to whether these coals were used under circumstances which enable the shipowners to demand a general average contribution must depend on what they were used for, and how they were used. If they were used for the purpose of working the engines under such conditions that any damage to the engines would be general average, then the coals used would be in the same position. The case therefore depends upon whether the use of the engines was the normal or ordinary mode of using them under usual circumstances, or whether the engines were used not only under unusual circumstances, but in

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an unusual and abnormal manner. Here we must first consider what are the conditions under which the shipowner can demand a general average contribution. The shipowner, if he insists that the cargo-owner is bound to contribute in general average, must show that the ship has been in some way injured, that the ship and cargo were both in danger, and that the damage to the ship happened in consequence of an intentional putting her into that danger in order to save both ship and cargo. Here it is admitted that both were in danger, and it is therefore of no use to argue about a case where a ship may touch a sandbank or be on a sandbank without danger to ship or cargo. A ship may, of course, be in that condition, and then the main circumstance on which to raise a general average contribution does not exist. But here the fact was that the vessel was not only on the bar, but was so fixed on the sand that both ship and cargo were in imminent danger. Then it was the duty of the captain to do everything in his power to save both ship and cargo. The ship was aground, and so much so that she had been there for four days. She was so far aground that she could not be got off without some extraordinary effort. It is found that what the captain did he did with the intention of saving both ship and cargo. It is not disputed that he was intentionally running a great risk. He was attempting to carry out what he knew to be a dangerous operation. But it is contended that he only used the ship and her powers, and that, if he only did that in the ordinary way, it cannot be brought within the doctrine of general average. I agree, and that will explain some of the cases which have been brought before us. I am not going to overrule any of them. I am dealing with the case of a ship hard and fast on \*the ground. That is not the normal [\* 64] condition of a ship. The normal condition of a ship is to be—except in mud harbours—afloat in the water. The movement which the captain determined on was to use the engines so as to force the ship off the ground. Is that a normal use of the engines? Mr. Walton, with great ingenuity, talked to us about the screw, and said the screw was in the water. It was not the screw, however, which was strained, but the engines. The engines have to force themselves round so as to turn the screw, whilst the ship, instead of being afloat, and therefore a moving mass, is hard and fast on the ground. The learned Judge came to the conclusion that, if you use engines to force a ship either one

No. 82.—The *Bona*, 64 L. J. P. D. & A. 64.

way or the other when she is hard and fast on the ground, that is not using them in the manner in which they were made to be used, and that to use them in that way is an abnormal way of using them, and one likely to cause greater damage to them. That is not using the ship and her equipment in a normal way. It is putting them to an abnormal use intentionally, knowing the risk, for the purpose of saving the ship and cargo from imminent danger. It seems to me that that state of things supplies all the conditions which, if the engines are strained, entitle the ship-owner to say that he intentionally put his engines to an abnormal risk for the purpose of attempting to save the ship and cargo, and that by doing so he saved them. I should have thought, therefore, that it was clearly a subject for general average. The coal is on the same footing. It was used for the purpose of working the engines in that abnormal way. The coal in being so used was itself used in an abnormal way, and the owner therefore is, under the circumstances, entitled to general average contribution. This appeal must be dismissed, and the judgment of the learned Judge upheld.

LINDLEY, L. J.—This case is a somewhat difficult one. It is not, I think, covered by any authority. The question is whether the defendants in the circumstances of this case are liable to contribute general average in respect of coal used in working the engines for the purpose of getting the ship off Galveston Bar. I look upon the coals as accessory to the engines, and it appears to me that the real question is, was there an extraordinary sacrifice? I think there was, and that it comes within the principle laid down by Mr. Justice LAWRENCE in *Birkley v. Presgrave*, 1 East, 220 (6 R. R. 256). The question is, What is the meaning of an extraordinary sacrifice? The learned counsel for the appellants contend that there was no such sacrifice in the present case, and they argue that you cannot be said to sacrifice anything if you use it for the purpose for which it is intended. I doubt that as a matter of law. Let us consider the position of affairs. The case shows that the ship was hard and fast on the bar, and had been there for several days. There was an intentional user of the engines, and a risk run in working them far beyond their power. For what purpose? For the purpose of assisting the ship off the bar where she was stuck. Are we then to say that there was not an extraordinary sacrifice? I think there was such a sacrifice, and

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I do not think that in so holding we are deciding anything contrary to the cases which were cited. I think that the appeal must be dismissed.

RIGBY, L. J.—I am of the same opinion. It is part of the case that the engines were put to an unusual strain. They were not made for such a strain. This was done under circumstances where both ship and cargo were in danger. It was absolutely necessary to take some extraordinary step, and what was done was to use the engines in a way in which they were never intended to be used.

I think the case comes within the rules as to general average contribution, and that none of the cases cited govern the present.

*Appeal dismissed.*

#### ENGLISH NOTES.

“All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionally by all who are interested.” *Per Lawrence, J., in Birkley v. Presgrave* (1801), 1 East, 220, 228, 6 R. R. 256, 263. This passage is cited as a true statement of the general principle by BOWEN, L. J., in *Seendsen v. Wallace* (C. A. 1884), 13 Q. B. D. 69, 53 L. J. Q. B. 385, 393. As to the application of the principle in that case, see *Atwood v. Sellar*, No. 83, p. 386, *post*.

No claim for general average arises when the master of a ship has been obliged to sell part of the cargo for the purpose of executing repairs made necessary by ordinary perils of the sea. *Hallett v. Wigram* (1805), 9 C. B. 480, 19 L. J. C. P. 281.

Expenditure incurred by reason of delay in a port to which the ship has run for safety is not general average. Nor does it become so, under an English contract, although such expenditure is charged as general average by decree of a foreign Court, unless it is shown that the practice in the foreign country is, by expressed intention or by general usage, incorporated into the contract. *Power v. Whitmore* (1815), 4 M. & S. 141, 16 R. R. 416. The case has been distinguished where goods had by reason of the perils of the sea got into the possession of the foreign Court, and could only be recovered under deduction of an amount enforced by the foreign Court as a general average contribution. The amount deducted was there held to be a loss by peril of the seas. *Dent v. Smith* (1869), L. R. 4 Q. B. 414, 38 L. J. Q. B. 144, 20 L. T. 868, 17 W. R. 646.

A clipper sailing ship with an auxiliary screw on a voyage from

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Melbourne to England came into collision with an iceberg and sustained such damage that her sailing power was practically destroyed. She put into Rio, where the expense of repairing her would have been so great that the captain properly determined to have her temporarily repaired, and to bring her home under steam. He purchased an extra quantity of coal, and brought her home accordingly. It was held that the expenses incurred in obtaining coal did not form a good claim by way of general average against the owners of a quantity of gold which had been shipped on board. *Wilson v. Bank of Victoria* (1867) L. R. 2 Q. B. 203, 36 L. J. Q. B. 89, 16 L. T. 9, 15 W. R. 693.

An extraordinary expenditure of coal for working a donkey engine, which supplied the place of extra hands on board a sailing ship on a long voyage, the work being required to keep down water from a leak which was not dangerous so long as the donkey engine was kept working, has been held to be not general average. Nor were expenses incurred for repairs of the donkey engine: *Harrison v. Bank of Australasia* (1872), L. R. 7 Ex. 39, 41 L. J. Ex. 36, 25 L. T. 944, 20 W. R. 385. The Court were divided on the question whether spare spars, &c., consumed for the same purpose before an extra supply of coal could be obtained, were general average; KELLY, C. B., and BRAMWELL, B., being of opinion in the affirmative, and MARTIN, B., and CLEASBY, B., in the negative. On this point, therefore, the plaintiff held his verdict.

In the *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro* (1887), 19 Q. B. D. 362, 57 L. J. Q. B. 31, 36 W. R. 105, the ship had taken the ground with a general cargo including specie belonging to the defendants. Some of the cargo was jettisoned to float the ship; and on this a claim for general average was allowed. After the ship had floated, the specie was taken out, landed on an island, and carried home in another ship. The expenses of this were claimed as general average. But the Court, drawing the inference that the specie was taken out, not for the safety of the ship and cargo generally, but for the safety of the specie itself, the claim was disallowed.

## AMERICAN NOTES.

Parsons cites this case (1 *Marine Insurance*, p. 306, defending the decision against Arnould's criticism that the rule should be confined to a ship of war, and observing that the shipper knew this vessel was armed, and perhaps selected her for that reason.

The following are cases of general average: labor and expense in floating a stranded vessel: *Bedford Com. Ins. Co. v. Parker*, 2 *Pickering* (Mass.), 1; 13 Am. Dec. 388; loss of vessel by voluntary running ashore to save cargo: *Gray v. Waln*, 2 *Sergeant & Rawle* (Penn.), 229; 7 Am. Dec. 642; *Columbian Ins. Co. v. Ashley*, 13 *Peters* (U. S. Supr. Ct.), 343; *Star of Hope*, 9 *Wal-*

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lace (U. S. Supr. Ct.), 232; *Fowler v. Rathbones*, 12 Wallace (U. S. Supr. Ct.), 120; *Bevan v. Bank of U. S.*, 4 Wharton (Penn.), 301; 33 Am. Dec. 64; *Reynolds v. Ocean Ins. Co.*, 22 Pickering (Mass.), 191; 33 Am. Dec. 727; but not to save lives of crew: *Meech v. Robinson*, 4 Wharton (Penn.), 360; 34 Am. Dec. 514; wages and provisions of crew during detention of vessel at intermediate port for repair: *Hanse v. New O. Ins. Co.*, 10 Louisiana, 1; 29 Am. Dec. 456; *Walden v. Le Roy*, 2 Caines (N. Y.), 263; 2 Am. Dec. 236; or during capture and adjudication: *Leavenworth v. Delafield*, 1 Caines (N. Y.), 573; 2 Am. Dec. 201; masts hanging over side of ship and cut loose: *Teetzman v. Clamageran*, 2 Louisiana, 195; 22 Am. Dec. 127; goods damaged in course of lightening from a stranded vessel: *Lewis v. Williams*, 1 Hall (N. Y. Super. Ct.), 430; expense incurred in such lightening: *Lyon v. Alvord*, 18 Connecticut, 75; money paid to compromise with captors: *Welles v. Gray*, 10 Massachusetts, 42; *Douglas v. Moody*, 9 ibid. 547; running a vessel ashore to escape capture: *Caze v. Reilly*, 3 Washington (U. S. Circ. Ct.), 298; damages by stranding of vessel afterwards floated: *Brown's Adm'r v. United States*, 15 Court of Claims, 392; *Northw. Trans. Co. v. Cont. Ins. Co.*, 24 Federal Reporter, 171.

The following have been held not cases of general average: jettison of goods on deck: *Cram v. Aiken*, 13 Maine, 229; 29 Am. Dec. 503; *Wolcott v. Eagle Ins. Co.*, 4 Pickering (Mass.), 429; *Smith v. Wright*, 1 Caines, 44; 2 Am. Dec. 162; *Lenox v. United Ins. Co.*, 3 Johnson Cases (N. Y.), 178; *Sproat v. Donnell*, 26 Maine, 185; 45 Am. Dec. 103; *Doane v. Keating*, 12 Leigh (Virginia), 391; 37 Am. Dec. 671; where impending peril was merely delayed and not averted by the sacrifice: *Scudder v. Bradford*, 14 Pickering (Mass.), 13; 25 Am. Dec. 355; *Emery v. Huntington*, 109 Massachusetts, 435; 12 Am. Rep. 725: "it must not be the very same danger, merely modified by acts done by the master in the performance of his ordinary duty in the navigation or management of the vessel, so to meet the impending peril as to diminish its effects as far as possible;" citing *Taylor v. Curtis*; loss by fire: *Ralli v. Troop*, 157 United States, 386; losses after abandonment: *McAndrews v. Thatcher*, 3 Wallace (U. S. Supr. Ct.), 348.

In *Crockett v. Dodge*, 12 Maine, 190; 28 Am. Dec. 170 (A. D. 1835), sacrifice of cargo when there was no possibility of saving it was held not to raise a claim for general average. The court said: "It is remarkable that among people so highly commercial as the English, very few judicial decisions on general average can be found. Abbot, afterwards Lord Tenterden, in his learned treatise on merchant ships and seamen, 327, says, 'The determination of English Courts of justice furnish less authority on this subject than on any other branch of maritime law, there being only three reported cases of questions between the parties liable to contribution in the first instance, and very few questions between the party so liable and the insurer, from whom indemnity has been sought.' Nor has the question been often the subject of judicial investigation in this country. Two such cases only have been cited in the argument. The one was in New York, *Bradhurst v. The Col. Ins. Co.*, 9 John. 9. There a ship in a case of extremity was run on shore. The ship was lost, but the cargo saved. It was held not to be a case of general average. The

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ship was not voluntarily sacrificed to save the cargo, but in a case of extreme peril she was run on shore, as a measure by which it was hoped that both might be preserved. The other is *Nickerson v. Tyson*, 8 Mass. 467. There the bowsprit, masts, and yards of a vessel, and the rigging and sails attached thereto, having been suddenly carried away, without the agency of the captain or crew, by the violence of the wind, but remained in the sea attached to the vessel by some of the rigging. And the ends of the masts and bowsprit, beating at times against the bow and sides, it was determined by the master and crew, for the preservation of the vessel and cargo, to free them from the vessel. The Court held that at the utmost all the owners of the vessel could claim would be a contribution proportioned to their value, when thus hanging by her side. We are of opinion that if in this case there was no possibility of saving the plaintiff's lime, he has no claim for contribution."

In *Bradhurst v. Col. Ins. Co.*, 9 Johnson (N. Y.), 9 (A. D. 1812), it was held (KENT, Ch. J.) that the damages by a voluntary stranding of a ship, which is afterwards recovered and pursues her voyage, are subject of general average; and so of expenses of salvage by lighters where the stranded ship is lost; but otherwise if by the act of stranding the ship is lost but the cargo saved: "The question does not appear ever to have arisen in the English Courts." (Then follows a learned review of the elementary writers.) But the United States Supreme Court held that whether the ship was lost or recovered makes no difference in regard to the liability of the owners of the cargo to contribute. *Columbian Ins. Co. v. Ashby*, 13 Peters, 331 (by STORY, J.), approving *Caze v. Reilly, supra*, *Sims v. Gurney*, 4 Binney (Penn.), 513, and *Gray v. Waln*, 2 Sergeant & Rawle (Penn.), 229, and disapproving the Bradhurst decision, *supra*: "For the general principle is, that whatever is sacrificed voluntarily for the common good is to be recompensed by the common contribution of the property benefited thereby."

In a note, 14 Am. Dec. 613, the editor says, citing *Walker v. U. S. Ins. Co.*, 11 Sergeant & Rawle (Penn.), 61; 14 Am. Dec. 610: "It is a settled rule of the law of general average, as laid down in the principal case, that there must be a voluntary sacrifice or loss of some portion of the associated interests for the common benefit, in order that the doctrine may be applied. Where an accidental loss occurs in the course of an endeavor to save ship and cargo, it is the misfortune of the party whose property suffers by it, and he cannot in equity ask his fellow adventurers to share it;" citing the rules laid down in *Star of Hope*, 9 Wallace (U. S. Supr. Ct.), 203. To the same effect: *Scudder v. Bradford*, 14 Pickering (Mass.), 13; 25 Am. Dec. 355.

In an exceedingly learned opinion in *Ralli v. Troop*, 157 United States, 403, Mr. JUSTICE GRAY says: "There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them." The point of decision was that the scuttling of a ship by the municipal authorities of a port, without the direction of her master or commander, to extinguish a fire in her hold, is not a general average loss. (Two justices dissented.)

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In *Van Den Toorn v. Leeming* (U. S. Circ. Ct.), 79 Federal Reporter, 107, it appeared that in a steamship bound for New York was discovered a crack in her shaft when about 316 miles from Sandy Hook. The shaft was strengthened by bolts, and she proceeded at reduced speed until 16 miles from Sandy Hook, when the shaft broke and greatly damaged the machinery. Contribution was claimed on the ground that the risk to the ship was foreseen and deliberately undertaken in order to save the ship and cargo the great expense of towage. The evidence showed however that while the officers recognized the possibility of a new breakdown and further damage, they confidently believed that it could be avoided. It was held that there was no such voluntary sacrifice of the ship to save cargo as was necessary to make a case of general average. The Court said: “The principles which are at the foundation of general average were elaborately discussed before the Supreme Court in the cases of *Barnard v. Adams*, 10 Howard, 270, *Dupont de Nemours v. Vance*, 19 Howard, 162, and in *The Star of Hope*, 9 Wallace, 203. In the first-named case, the Court announced, with precision, the three things which ‘must concur’ in order to constitute a case for general average,’ which can be summarized as follows: (1) A common, imminent danger, to be overcome by voluntarily incurring the loss of a portion of the whole to save the remainder; (2) a voluntary casting away of some portion of the joint concern for the purpose of saving the residue; (3) the attempt must be successful. The controversy in this case is not in regard to the principles which are applicable to it, but it is whether the facts are those which ought to exist in order to create a case for general average. We say ‘ought to exist,’ for it is worthy of note that the tendency of modern adjustments is to enlarge the boundaries of expenses which are included in the adjustment. The question of fact is whether there was, at the time of the repair of the shaft and the decision to proceed to New York under the vessel’s steam, a voluntary, expected sacrifice of anything; whether there was even a decision to enter upon a peril to the ship; or whether it was the usual case of repair, in the belief that the port of destination, 316 miles distant, could be reached in safety. Upon this point we fully concur in the conclusion of the District Judge, that ‘The evidence going to show any expected sacrifice on the part of the ship, or an expectation of such damage as actually happened, is not as strong or as convincing as is stated in the libellant’s argument. The evidence hardly shows more than the recognition of a possibility of injury, but with a confident expectation that any breakdown would be avoided.’”

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No. 83.—**Atwood v. Sellar**, 5 Q. B. D. 286, 287.—Rule.

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. No. 83.—ATWOOD *v.* SELLAR.

(c. a. 1880.)

RULE.

WHERE a ship puts into a port for repairs, rendered necessary by an act which is itself a general average sacrifice, the expenses of warehousing and reloading of the cargo and the coming out of port are, as well as the expenses of coming into port and unloading, the subjects of general average contribution.

**Atwood and others v. Sellar & Co.**

5 Q. B. D. 286–299 (s. c. 49 L. J. Q. B. 515; 42 L. T. 644; 28 W. R. 604).

[286] *Insurance. — General Average. — Expenses of warehousing and reshipping Cargo, of Pilotage, and other Charges on Vessel leaving Port.*

Where a vessel goes into a port of refuge, in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average.

So held, affirming the judgment of the majority of the Queen's Bench Division.

Appeal from the judgment of the Queen's Bench Division in favour of the plaintiffs (4 Q. B. D. 342).

[\*287] \* The special case stated that the action was brought by the plaintiffs as owners of the ship *Sullivan Sawin*, to recover £13 14s. 9d., in respect of a general average contribution, from the defendants, as owners and consignees of certain goods on board that vessel.

The vessel, while on her voyage from Savannah for Liverpool, encountered severe weather, and in consequence a general average sacrifice became necessary, and was made, the master being compelled to cut away the foretopmast. The vessel therefore put into Charlestown on the 21st of February, 1877, to repair the damage. In order to effect these repairs and enable the vessel to prosecute her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping the same; and further expenses were incurred at Charlestown

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for pilotage and other charges paid in respect of the ship leaving port and proceeding on her voyage.

The case of the *Sullivan Sawin* was put into the hands of an average adjuster to prepare the adjustment, which he did, charging the whole of the expenses to general average, and the plaintiffs brought this action to recover the contribution due from the defendants in respect of their goods upon the footing of that adjustment. The defendants were willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters, which was stated in the case to be as follows: It is, and for from seventy to eighty years past has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average; the expense of warehousing it as particular average on the cargo; the expense of reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendants a contribution in excess of what would be payable according to the practice of British average adjusters as stated in the case.

\* Feb. 23, 24, 25, 26. Cohen, Q. C., and J. C. Mathew [\* 288] for the plaintiffs.

Butt, Q. C., and Fullarton for the defendants.

The arguments are fully stated in the judgment.

The following cases were cited in addition to those mentioned in the judgments: *The Copenhagen*, 1 C. Rob. 289; *Newman v. Cazelet*, Park Ins. 900, 8th ed.; *Simonds v. White*, 2 B. & C. 805 (No. 86, p. 422, *post*); *Mavro v. Ocean Marine Insurance Co.*, L. R. 9 C. P. 595; *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203; *Blasco v. Fletcher*, 14 C. B. (N. S.) 147. Cur. adv. vult.

March 24. The judgment of the Court (BRAMWELL, BAGGALLAY, and THESIGER, L. J.) was delivered by

THESIGER, L. J.—The question raised by this appeal is, whether in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of

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warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average also.

The matter came before the Court below in the form of a special case, and upon it the Court decided in favour of the plaintiffs, who assert that the expenses in question are the subject of general average. The special case states a long-continued practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average; and the expense of warehousing it as particular average on the cargo, and the expense of the re shipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. It was not, however, and could not reasonably be contended for the defendants, that the practice could be put so high

as a custom impliedly incorporated in the contract between  
[\* 289] \* the parties, and during the course of the argument we

intimated our opinion, founded on the language of the special case with regard to this practice, and especially the language of the fifth paragraph, that the question between the parties must be decided in accordance with legal principles and authority which the practice of the average adjusters professes to follow. The law governing the case is admittedly English law, for the expenses in dispute arose upon a voyage the proper and actual termination of which was an English port. As a matter of principle we are clearly of opinion that the judgment of the majority of the Court below in favour of the plaintiffs was right. The principle which underlies the whole doctrine of general average contribution is that the loss immediate and consequential caused by a sacrifice for the benefit of cargo, ship, and freight should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to the vessel to enable it to proceed on its voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and

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of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded; and that general average ceases at the point of time when the common danger is at an end. The proposition is, as will appear later, sound when applied to cases in which a ship is damaged by a peril of the sea, and before any voluntary sacrifice, such as putting into an intermediate port, is made, the goods are unshipped and in safety; but its application to a case like the present is not admissible. A vessel which has put into port to repair an injury, occasioned by a general average sacrifice, may be, and generally is, when in port, in perfect safety; and if by the expression "common danger" be meant danger of actual injury to vessel and cargo, there is no more danger to the goods when on board the vessel being in port than when stowed in a warehouse on shore; and, indeed, in many cases only a portion of the goods is removed from the vessel in order to do the repairs to her, while the remainder of the goods is left on board.

If, on the other hand, \* by "common danger" be meant [\* 290] the danger of the vessel with her cargo being prevented from prosecuting her voyage, then there is no more reason why the expenses of warehousing and reloading, and the expenses incurred for pilotage and other charges paid in respect of the vessel leaving port and proceeding on her voyage, should not constitute general average, than there is reason for saying that unloaded and warehoused goods should not contribute, as it is clear in a case of a voluntary sacrifice that they must, to the expenses of the necessary repairs to the vessel. Both classes of expenses are extraordinary expenses consequent upon the voluntary sacrifice, and necessary for the due prosecution of her voyage by the vessel with her cargo. Neither class can, as a general proposition, be said to be incurred exclusively for the benefit of either vessel or cargo. In some cases it might be for the interest of a shipowner to terminate the voyage at the port where his vessel puts in to repair a disaster, while it might be all important for the goods' owner to have his goods carried on by the same vessel. In other cases the position of the parties in this respect might be reversed; but however this may be, the going into port, the unloading, warehousing, and reloading of the cargo and the coming out of port, are, at all events, parts of one act or operation contemplated, resolved upon, and carried through, for the common

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safety and benefit, and properly to be regarded as continuous. The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose, being *ex hypothesi* consequent upon a damage voluntarily incurred for the general advantage, should legitimately be the subject of general average contribution, or, to use the language of Lord TENTERDEN in his work on Shipping, "If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal." But it is said for the defendants that if this be so, and the principle be carried out to its logical consequences, expenses incurred for wages of crew and provisions should equally form the subject of general average, and

that inasmuch as it is, as they suggest, undeniable that [\*291] they do not, the principle itself must either be \*faulty, or at least not recognised in English law. As a matter of fact it is extremely doubtful whether the expenses for wages of crew or provisions in a port for refuge have ever been disallowed by our Courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average; but even if the assertion were correct, the conclusion drawn would by no means follow.

That the principle in question is not faulty we have endeavoured to show in the observations already made, and the view we have taken upon the point is strongly confirmed by the fact that it is recognised and carried to its so-called logical consequences as regards the wages of crew and provisions in all other countries than our own.

That the principle is not recognised in English law is not proved by showing that expenses incurred for wages of crew and provisions have been under certain circumstances disallowed as the subject of general average, unless it be shown — which it has not been to us — at the same time that they have been disallowed upon grounds that negative the principle, and it is disproved if it be found that, notwithstanding such allowance, the expenses in question in this case have been allowed. All that in such a case can be said is, that either the Courts have made a mistake in limiting the application of the principle, or that its limitation is due to some real or supposed rule of public policy.

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If, then, the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated, and it at least may fairly be asked what other principle, if it be not correct, is to be substituted in its place.

But the authorities remain to be considered; and it is the more necessary that they should be examined with attention, seeing that the practice of the average adjusters professes to follow them.

In *Plummer v. Wildman*, 3 M. & S. 482 (16 R. R. 334), a ship put back into port to repair damage partly caused by a collision with another ship and partly by a cutting away of part of the rigging of the bowsprit, to which the master was compelled, in consequence of the previous injury due to the collision, and which it was contended for the shipowner \* was a [\* 292] general average cause. The cargo was necessarily relanded and warehoused in order that such temporary repairs might be done as would enable the ship to prosecute her voyage; and such repairs having been done, and a portion of the cargo sold to defray expenses, the remainder of the cargo was reloaded, and the ship proceeded to her port of destination. Among other expenses claimed as general average were the expenses of repair necessary to enable the ship to prosecute her voyage, the expenses of unloading and reloading the cargo, the master's expenses, at five dollars per diem, during the unloading, repairing, and reloading, and expenses for crimpage to replace deserters during the repairs. The question for the Court was, whether the case was one of general average, and if so to what extent. It is a little difficult to gather from the judgments in the case what was the exact view of the different members of the Court who delivered judgments, as to the separate heads of claim. Lord ELLENBOROUGH appears to have decided that only the captain's expenses in port and crimpage were to be disallowed. LE BLANC, J., said that the unloading might be general average if it were necessary, in order to repair the ship, but leaves it in doubt whether the expenses of reloading would or not follow. BAYLEY, J., deals only with the question how much of the repairs should be allowed as general average, which was the principal question as regards items. Lord ELLENBOROUGH, however, laid down that if the return to port was necessary for the general safety of the whole concern, it seemed that the expenses unavoidably incurred by such necessity might be

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considered as the subject of general average; and that it was not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship without endangering the whole concern from further prosecuting her voyage, unless she returned to port and removed the impediment.

But in the same year as that in which *Plummer v. Wildman*, 3 M. & S. 482 (16 R. R. 334), was decided, the case of *Power v. Whitmore*, 4 M. & S. 141 (16 R. R. 416), came before the same Court. In that case the cause of damage was a peril of the sea, and the ship having in consequence of it been compelled [\* 293] to \* go into port for the safety of ship and cargo, a claim to have the wages and provisions of the crew during the stay in port, and the expenses of repair, treated as general average was made. The claim was, however, disallowed, and Lord ELLENBOROUGH, in delivering the judgment of the Court, took occasion to qualify the proposition laid down in *Plummer v. Wildman*, and to explain and justify the decision in that case, upon the ground that there the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed. The judgment, then, in *Power v. Whitmore* must be taken to recognise that there is, in reference to a port of refuge expenses claimed as general average, a distinction between a case of a vessel putting into a port for repair in consequence of a voluntary sacrifice, and a case of a vessel so putting into port in consequence of an ordinary peril of the seas, although in both cases the putting into port itself may equally give rise to a claim for general average contribution. In *Hallett v. Wigram*, 9 C. B. 580, at p. 607, CRESSWELL, J., in speaking of *Power v. Whitmore*, said that Lord ELLENBOROUGH had there stated the rule according to what had always been and still was understood to be the law as to general average. WILDE, Ch. J., 9 C. B. 580, at p. 603, in the same case quoted the following passage from Abbott on Shipping, 8th ed., p. 478: "Thus if it be necessary to unload the goods in order to repair the damage done to a ship by tempest or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held that the expenses of unloading, warehousing, and reshipping the goods, should be sustained by general contribution, because all

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persons are interested in the execution of the measures necessary to the completion of the voyage," and added that the reason there assigned might be applicable to the case the author has in his mind, — *Plummer v. Wildman*; but that as a general proposition it was too large. The CHIEF JUSTICE then pointed out that the decision in *Plummer v. Wildman* had been explained in *Power v. Whitmore*, upon the ground that the expenses were consequent upon a voluntary sacrifice, and then quotes, apparently with approval, the following passage from Abbott, 8th ed., p.

497 : \* " It seems to result from these decisions that if a [\* 294] vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average; but if the damage was incurred by the mere violence of the wind or weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner 'to keep his vessel tight, staunch, and strong' during the voyage for which she is hired." The actual decision in *Hallett v. Wigram*, 9 C. B. 580, was, that a claim to general average does not arise where a part of the cargo is sold to raise money at a port to which a ship has put back for the repair of damage incurred by ordinary perils of the sea. That case was decided in 1850, *Power v. Whitmore*, 4 M. & S. 141 (16 R. R. 416), in 1815, and we have therefore the law, as laid down by the Courts for a considerable portion of the period over which the practice of average adjusters stated in the special case extends, running counter to that practice, by recognising as regards port of refuge expenses a distinction between cases where a ship puts into a port of distress for repair of damage caused by a voluntary sacrifice, and cases where it so puts in for repair of damage caused by peril of the seas; and admitting, in the former cases, as a matter of principle if not of express decision, expenses such as those in question in this case to be the subject of general average contribution.

This distinction in principle is to be found asserted by Benecke, who was a member of Lloyd's, in his valuable work on the "Principles of Indemnity in Marine Insurance," published in 1824. At p. 191 he says: " If setting aside all laws and received opinions

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the case is examined merely according to the fundamental maxims which regulate general and particular average, it will in the first instance appear evident that not only all the port charges, such as pilotage, harbour dues, lighterage, &c., but also the charges of unloading and reloading, repairs and crew's wages, will be general average if the ship put into port for the mere purpose of repairing

a damage voluntarily incurred for the general advantage.

[\* 295] For all \* these expenses, being the necessary consequences of a measure taken for the general benefit, belong to general average." And then turning to the case where the port is entered in consequence of a particular damage sustained, by which the vessel is rendered unfit to prosecute her voyage, as where masts, sails, or other requisite apparel are lost in a storm, or a vessel has sprung a dangerous leak, he adds: "All the expenses of entering the port are a subject of general average, being the consequence of a measure voluntarily taken for the preservation of the whole. But as soon as the object of putting the vessel and her cargo in safety is accomplished, the cause for general contribution ceases; for whatever is subsequently done is not a sacrifice for the benefit of the whole, or for averting an imminent danger, but it is the mere necessary consequence of a casual misfortune." Benecke then claims the allowance even of wages of crew and provisions where the putting into port is the consequence of a damage belonging to general average; on the other hand, he contends for the disallowance even of the expenses of unloading cargo where it is the consequence of a damage belonging to particular average.

In Stevens on Average and Bailey on Average the distinction referred to is not adopted, except as regards the repairs of the ship; but both writers assert as a matter of principle that where a ship necessarily puts into a port to repair damage, whether the original cause of damage be a voluntary sacrifice or an ordinary peril of the sea, the expenses of warehousing and reloading, as well as those of unloading the cargo, and the outward as well as the inward port charges, should be the subject of general average contribution. See Stevens, p. 22, and Bailey, p. 119. They look not to the more remote damage which undoubtedly was a particular average loss, but to the proximate act of putting into port for the safety of ship and cargo which would belong to general average, and in answer to the argument that their views, if logically carried out, would lead to the allowance as general average of the

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cost of the repair of the ship, Bailey, at p. 119, replies that the damage which necessitated that repair being caused by a peril of the sea, the repair should be treated as particular average, but that the ship does not put into the port of refuge because she wants repairs, but because the voyage cannot be continued until she is repaired, or \* a total loss of ship and cargo will [\*296] follow if she does not go into port; he adds, at p. 120:

"The immediate cause of putting into the port of refuge is the impossibility of completing the voyage in her then state or the expected total loss of ship and cargo; the damage which the ship has sustained is the remote cause only, for under other circumstances the crew are not justified in putting into port, although the vessel may have sustained damage which it will be necessary ultimately to repair." The views thus expressed are substantially those which are recognised in American law and practice, and they are carried out to the length of including the expense of wages of crew and provisions at the port of refuge in the amount to be contributed for in general average, in all cases where a vessel puts into port for the common safety, whether owing to injury from a peril of the sea or a voluntary sacrifice. See Phillips on Insurance, 3rd ed., s. 1322, 6, 8. To return to the text-writers of this country, Mr. Arnould, in his work on Marine Insurance, 3rd ed., vol. ii. p. 789, after discussing the principles relating to general average, says: "From these principles it follows that where a ship has either cut away her masts or rigging, or has been so damaged by a storm that it is necessary for the safety both of ship and cargo to put into a port of distress for repairs, all the expenses inseparably connected with the act of first putting into and afterwards clearing out of such a port of distress give the shipowner a claim to a general average contribution; and this upon the plain ground that these expenses are a necessary consequence of an extraordinary measure taken for the general preservation."

Neither of the already cited cases of *Power v. Whitmore* and *Hallett v. Wiggram* is a direct authority against the proposition just quoted, except so far as the disallowance of the expenses for wages of crew and provisions in the former case can be said to be such; for, as pointed out, the main subject of contention in those cases was the claim for expenses of repair made, notwithstanding that such repair was in each case rendered necessary in consequence of injury caused by ordinary perils of the sea; and neither

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the expenses of unloading, warehousing, or reloading cargo, [\* 297] nor port or pilotage charges, came in question. \* The case of *Hall v. Janson*, 4 E. & B. 500, 24 L. J. Q. B. 97, decided in 1855, is, on the contrary, direct authority in favour of the proposition that the expense of reloading as well as of unloading cargo constitutes a claim to general average contribution, even though the original cause of putting into port was a particular average loss. There, in an action upon a policy of marine insurance, a count of the declaration stated that the ship had been damaged by stormy weather and forced to go into a port for repair, in order to enable her to prosecute her adventure and proceed on her voyage, and had there incurred expenses, *inter alia*, in and about unloading and reloading cargo which was necessarily unloaded for the repair of the ship. This count was upon demurrer held good as showing the accruing of a general average loss; and Lord CAMPBELL, Ch. J., in delivering the considered judgment of the Court of Queen's Bench upon the point, said: "Now the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship that she may be capable of proceeding on the voyage have been held to give a claim to general average contribution; for the acts which occasioned these expenses become necessary from perils insured against, and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight." And after citing *The Copenhagen*, 1 C. Rob. 289, *Plummer v. Wildman*, 3 M. & S. 482 (16 R. R. 334), and Stevens on Average, as authorities in support of the proposition, he added: "This doctrine is quite consistent with what is laid down in *Pover v. Whitmore*, 4 M. & S. 141 (16 R. R. 416), and the other cases relied upon by Mr. Wilde." It is not necessary for us to decide in the present case whether *Hall v. Janson* was rightly decided, and whether the expenses in dispute in the present case would properly belong to general average, if the original cause of damage to the ship had only been a cause belonging to particular average. If, however, the Court of Queen's Bench, in the judgment just quoted, and the several text-writers, other than Benecke, from whom we have quoted, are right in the propositions affirmed by them, and the expenses would in such a case belong to general average, it follows, *à fortiori*, that [\* 298] they would so belong when, as is the fact \* here, the original cause was a voluntary sacrifice, while, on the other

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hand, even if the proposition laid down in *Hall v. Janson*, 4 E. & B. 500, 24 L. J. Q. B. 97, and supported by the text-writers referred to, were too wide, there would still be left a consensus of opinion to the effect that in such a case as the present, at least, the expenses in question must be treated as constituting a claim to general average contribution. In either case the practice of the average adjusters as stated in the special case would be erroneous, and it is to be gathered from a recent edition of a modern work on the law of general average by Mr. Lowndes, himself also an average adjuster of experience, 3rd ed. 107, that as regards port of refuge expenses where the bearing up into port is necessitated by a sacrifice, the principle that they should be treated as general average is apart from his own practice, which gave rise to the present action, at least beginning to be recognised in the practice of adjusters and underwriters. The two cases of *Job v. Langton*, 5 E. & B. 779, and *Walthev v. Marrojani*, L. R. 5 Ex. 116, do not really touch the point. In each of these cases a vessel having been accidentally stranded, so that the damage thereby caused was only a particular average loss, was got off and taken into port for repair at considerable expense after the cargo had been unshipped, landed, and warehoused in safety. It was attempted unsuccessfully to make the cargo contribute to such expense as general average. There can be no doubt as to the correctness of the decisions in those cases, for the whole basis of any general average claim was gone as soon as the cargo was unshipped. The vessel was got off and put into port for repair not to avert a loss to the whole adventure, but to repair the particular average damage. Lord CAMPBELL, Ch. J., delivered the judgment of the Court in *Job v. Langton* (6 E. & B., at p. 791), and in the course of his judgment said "that the stranding was fortuitous, arising directly from perils of the sea, and that the expenses must therefore, in order to constitute general average, be brought within the category of extraordinary expenses incurred for the joint benefit of ship and cargo." And it is obvious, from the whole judgment, that Lord CAMPBELL not only did not consider that his observations would be applicable to the case of a voluntary sacrifice, but

\*also did not consider that there was any conflict between [\* 299] his then decision and his former judgment in *Hall v. Janson*. There is nothing in the judgment in *Walthev v. Marrojani* which alters the case. The result of this review of the

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authorities is to confirm the opinion which, apart from authority we entertain and have already expressed upon the question submitted to us. The practice, then, of the average adjusters, as stated in the special case, appears to us to be neither founded on true principles, nor to be in accordance with the views of the text-writers, and so far as there is case authority upon the matter, it appears to us to be opposed to legal decisions. It is a practice, too, which has not been, as the practice in *Stewart v. West India and Pacific Steam Ship Company*, L. R. 8 Q. B. 88, was, made a part of the contract between the parties, and therefore constitutes no impediment to our giving effect to the objections to its validity; and in deciding, as we do, that the judgment of the majority of the Court below was right and should be affirmed, it is satisfactory to us to know that the law, as laid down in the judgment of the Court below and of this Court, is placed upon a footing which more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile and maritime communities.

*Judgment affirmed.*

## ENGLISH NOTES.

In *Svensden v. Wallace* (C. A. 1883, H. L. 1884), 13 Q. B. D. 69, 10 App. Cas. 404, 53 L. J. Q. B. 385, 54 L. J. Q. B. 497, a ship on a voyage from Rangoon to Liverpool sprang a leak which made it dangerous to continue the voyage. The captain, acting for the safety of the ship and cargo, put into the port of St. Louis in the Mauritius. There was still danger of the ship sinking in harbour, and for the common safety the cargo was unloaded. The vessel was then taken into dry dock and repaired, after which she reloaded and completed her voyage. The claim by the shipowners for general average in respect of the towage, pilotage, and port dues inwards and in respect of the unloading of the cargo was conceded, and the owners of the goods admitted their liability to pay the warehouse rent of the cargo; but they refused to contribute towards the reloading of the cargo, or the pilotage, or port dues outwards. The question was whether the claim to contribution for the reloading, and for pilotage and port dues outwards, was good as a claim for general average. The Court of Appeal held it was not. As the case came before the House of Lords the question was narrowed to the point whether the claim for reloading was good; and the House decided that it was not. Broadly the decisions were based on the ground that the acts done for the common safety were at an end when the cargo was landed. The cargo was then safe, and so was the ship, except for

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the sea damage, which was in that case particular average. “The broad and obvious distinction,” as Lord Justice BOWEN puts it (13 Q. B. D. 95, 53 L. J. Q. B. 398), “is that in *Atwood v. Sellar* there was a general average sacrifice of a portion of the ship herself which rendered necessary the repairs of the vessel in port, and the unloading, warehousing, and reloading of the cargo for that purpose.” That is to say, all this was necessary to make up to the shipowner his original voluntary sacrifice.

## AMERICAN NOTES.

This case was too recent for citation in Parsons on Marine Insurance, but *Hall v. Janson*, cited in the principal case, is cited in 2 ibid. 319. Expenses of unloading and storage of cargo are included in general average in *Barker v. Phoenix Ins. Co.*, 8 Johnson (N. Y.), 307.

*Hallett v. Wigram*, cited in the principal case, is also cited by Parsons (2 Marine Insurance, p. 257), and he gives it as the settled law of this country that expenses of repair, if necessary, from the time the vessel bore away for the port of repair, come under general average. Citing *Walden v. Le Roy*, 2 Caines (N. Y.), 263; *Thornton v. U. S. Ins. Co.*, 3 Fairfield (Maine), 150; *Clark v. U. F. & M. Ins. Co.*, 7 Massachusetts, 365; *Peters v. Warren Ins. Co.*, 3 Sumner (U. S. Circ. Ct.), 400; *Barker v. Phoenix Ins. Co.*, 8 Johnson (N. Y.), 318; and see *Bedford Com. Ins. Co. v. Parker*, 2 Pickering (Mass.), 1; 13 Am. Dec. 388 (A. D. 1873). In the last case the Court said: “We therefore find no difficulty in deciding that when a vessel is accidentally stranded in the course of her voyage, and by labor and expense is set afloat, and completes her voyage with the cargo on board, the expense bestowed on this object, as it produces benefit to all, so it shall be a charge upon all, according to the rules of apportioning general average.” The Court also said: “This case presents a question which we do not find to have been decided in this State, in New York, or in England; and what is quite as remarkable, on inquiry among underwriters of the city of Boston, it appears that it is considered a new question by them, cases of the kind either not having occurred or having been settled without dispute, upon principles of compromise.” “There can be no doubt that this decision was correct.” *McAndrews v. Thatcher*, 3 Wallace (U. S. Supr. Ct.), 374. See *Nelson v. Belmont*, 21 New York, 38, approving the Massachusetts case, and citing *Job v. Langton*, 6 El. & Bl. 779, and *Moran v. Jones*, 7 ibid. 523, and observing: “If the enterprise is not abandoned, and the property, although separated from the rest, is still under the control of the master of the vessel, and liable to be taken again on board for the purpose of prosecuting the voyage, the relations of the several owners are in no respect changed. The common interest remains, and whatever is done for the protection of that common interest should be done at the common expense.” *Bevan v. Bank of the U. S.*, 4 Wharton (Penn.), 301, cited by Lord CAMPBELL in *Moran v. Jones*, was distinguished in *McAndrew v. Thatcher* and *Nelson v. Belmont*. In the *McAndrew* case the Court, after observing that unloading the cargo, partly to save the goods, but also to lighten and float the vessel, did “not necessarily divest the transaction of its character as an act performed

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for the joint benefit of the ship and cargo," continued: "Except where the disaster occurs in the port of destination, or so near it that the voyage may be regarded as ended, the master, if the goods are not perishable, has the right, and if practicable it is his duty, to get off the ship, reload the cargo, and prosecute the voyage to its termination."

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(c. p. 1837.)

**RULE.**

Goods laden on deck, and necessarily thrown overboard for the preservation of the ship and general cargo, do not ordinarily constitute a general average loss; but where goods are laden on deck in accordance with a general usage of trade upon voyages of the like description, the owner of the goods is, in such a case, entitled to a general average contribution.

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4 Bing. N. C. 134-143 (s. c. 5 Scott, 445; 3 Hodges, 307; 7 L. J. (N. S.) C. P. 68).

*Insurance. — General Average. — Timber loaded on Deck.*

[134] The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship-owner for a loss by jettison.

The second count of the declaration stated, that whereas the plaintiff's, before and at the time of the happening of the damages and losses in that count mentioned, were the owners and proprietors of certain merchandise and chattels, to wit, twenty-six pieces of timber, then being in and on board a certain ship or vessel of the defendant, and laden and placed on the deck thereof, to be carried and conveyed therein for freight payable to the defendant in that behalf, on a certain voyage whereon the said ship was then

proceeding, to wit, from Quebec to London; and whereas, [\*135] \* before and at the time of the loading of the said last-mentioned pieces of timber, in and on board the said ship or vessel, there had been, and was, a certain ancient and laudable custom used and approved of, touching and concerning the loading

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of timber in and on board ships or vessels trading between Quebec and London, and employed in carrying timber from Quebec to London aforesaid, that is to say, that the owners of such ships or vessels have had, and have been used and accustomed to have, and of right have had, and still of right ought to have for themselves and their servants, the liberty and privilege of loading and placing on the deck of such ships or vessels a reasonable part of such timber as they from time to time, respectively, are employed to bring from Quebec to London; and whereas, also, the said ship or vessel, in that count first mentioned, at the time of the happening of the damages and losses in that count mentioned, was a ship or vessel trading between Quebec and London, and employed in carrying timber from Quebec to London aforesaid; and the said twenty-six pieces of timber, so laden and placed on the deck of the said ship or vessel, were then a reasonable part in that behalf of the timber which the defendant was then employed to carry in that voyage by the said ship or vessel from Quebec to London; and the said twenty-six pieces of timber were laden by the defendant on the deck of the said ship or vessel, in pursuance of and according to the said custom; and whereas, also, whilst the said ship or vessel was sailing and proceeding on her said voyage with the said chattels and merchandise on board, to wit, on, &c., by storms, winds, and tempestuous weather, in order to preserve the said ship or vessel, it then became expedient and necessary to throw and cast overboard the said chattels and merchandise, being the property of the plaintiffs of great value, to wit, of the value of £100; and the same were \* then, according'y, [\*136] cast and thrown overboard, and became, and were wholly lost to the plaintiffs; and the said ship or vessel was, by means of the premises, then saved and preserved, and afterwards, to wit, on, &c., arrived safely, to wit, at London aforesaid; of all which last-mentioned premises the defendant afterwards, to wit, on, &c., had notice; and then, in consideration of the last-mentioned premises, promised to pay the plaintiffs so much money as the defendant, as owner of the said ship, and interested in the said freight, was liable to contribute to the sail losses and damages in a general average, on request; the plaintiffs averred that the defendant, as such owner of the said ship, and so interested in the said freight, was liab'e to pay and contribute to the sa'd losses and damages, in a general average, a large sum of money, to wit.

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the sum of £20; whereof the defendant afterwards, to wit, on, &c., had notice; yet the defendant disregarded the said promise, and had not paid the last-mentioned sum of money, or any part thereof.

Plea; that though true it was, that before and at the time of the loading of the said pieces of timber in and on board the said ship or vessel, there had been and was the said custom, in the second count mentioned, yet there had not been, and was not any custom that any contribution and general average should be paid upon the loss or damage of timber so laden and placed, as in the said count mentioned, and cast and thrown overboard as in that count mentioned: and that, the defendant was ready to verify, &c.

Demurrer; that it was admitted in and by the last-mentioned plea, that such custom existed in fact, as was stated in the second count of the declaration; and that the matter sought to be put in issue by the said plea was a conclusion of law necessarily result-

[\* 137] ing from such custom in fact; and also that no apt; suffi-  
cient, or material \* traverse of fact could be taken upon  
the matter alleged in the said last-mentioned plea.

## Joiner.

The case was argued in Trinity Term by

Wilde, Serjt., for the plaintiffs.

The plea is ill, and the plaintiffs are entitled to contribution. By the rule of the Rhodian law, if goods are thrown overboard in order to lighten a ship, the loss incurred for the benefit of all shall be made good by the contribution of all: Abbott on Shipping, part 3, chap. 8, s. 2, p. 355; *Price v. Noble*, 4 Taunt. 123 (13 R. R. 566); and there is nothing to exempt this defendant from the operation of the general rule. For this is not a question between the different shippers of goods, nor between assured and underwriter, but between the shipper and the owner of the ship; and though, in general, the owners of other goods, and insurers, are exempted from contribution in respect of the jettison of goods laden on deck, because such a mode of lading obstructs the management of the ship: French Ordinance, liv. 3, tit. 8, art. 13; *Backhouse v. Ripley*, Park on Ins. 26; Abbott on Shipping, part 3, chap. 8, s. 13, p. 368; yet those parties are not exonerated where there is a custom for loading on the deck: *Da Costa v. Edmunds*, 4 Camp. 142 (16 R. R. 763); nor is the owner ever exonerated, because if the goods were placed there without the

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consent of the shipper, the shipowner shall not take advantage of his own wrong; and if they were placed there by the consent of the shipper, it must have been at the request and for the convenience of the shipowner, who ought not thereby to escape from his general liability. The responsibilities of underwriters depend on the contract in the policy of insurance, while the claim for general average rests on a general rule of law: *Simonds v.*

\* *White*, 2 B. & C. 805 (p. 422, *post*); *Price v. Noble*; and in [\*138] the French Ordinance, b. 2, tit. 1, art. 12, fo. 397, a case is referred to where there being a known usage upon the voyage in question to load goods upon the deck, the under-deck cargo of flour was held bound to contribute to the jettison of the upper-deck cargo. Where the goods are improperly placed on the deck, the owners of other goods are not liable; but the owner of the ship is never exonerated from contribution, because he, or his servant the captain, might have prevented the improper stowage: *Code Napoleon (Commerce)*, art. 421, *Laws Ancient and Modern, of the Sea*, 323, 325; but here it is expressly averred in the declaration that the goods were properly stowed, according to the custom of the trade.

Stephen, Serjt., for the defendant.—If this action proceeds on the custom, the count is insufficient. The custom is not alleged to have existed from time immemorial; and even if that should be deemed unnecessary in a custom of trade, at all events the usage should have been distinctly set forth; for time and usage are the two pillars of custom: 1 Leon. 242; Bro. Abr., Custom, fo. 251, pl. 51; Co. Lit. 110 b, 113 b. All customs, too, are local; a qualification which the count has not attached to the custom in question. If it existed, it impliedly became a part of the defendant's contract, which should have been set forth accordingly, as it was in *Birkley v. Presgrave*, 1 East, 220 (6 R. R. 256).

The main question, however, is, whether, where it is usual to stow goods on deck, contribution may be claimed in respect of the jettison of such goods. Now the general rule is, that contribution cannot be claimed in respect of goods laden on deck. And to that rule there is no exception; for though it is true that by another \* rule the master is allowed to load goods on the [\*139] deck, where such is the usage of the particular voyage: *Abbott on Shipping*, p. 363; yet there is no authority for saying that he is therefore liable to general average. *Da Costa v.*

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*Edmunds* was an action against an underwriter, and the claim turned on the construction to be put on the contract, not on the general law. The master or owner may be liable for the injury in an action on the case for improperly stowing, but not for a general average. By the Ordinance of Louis XIV., art. 12, s. 16, no master shall lay any goods on his ship's deck without consent of the owners, on pain of being answerable for all damages; and by art. 13, s. 33, no contribution shall be demanded for payment of such goods as shall be on deck, leaving the owner his recourse against the master. To the same effect is Code Napoleon (Commerce), 421; Emerigon, cap. 12, s. 42; Pardessus, Cours de Loi, vol. 3, art. 795, p. 192. If the master has the consent of the owner to put his goods there, he is free from all responsibility. All these authorities speak of the master, and not of the ship-owner. The authority of Emerigon is decisive, and overrules the case in the French Ordinance, of the cargo of flour; and in Phillips on Insurance, 323, a case appears to have been decided in the American Courts, in which it was held that where there was a custom to that effect, goods might be carried on deck without the owner's consent, and without any claim against the other shippers or the shipowner for contribution. Common peril is the principle of the law of general average; but goods below deck are not in equal peril with goods above; and it is a *non sequitur* to say that because goods may be loaded on deck, therefore they are entitled to contribution for jettison.

Wilde, in reply. . . .

*Cur. adv. vult.*

[140] TINDAL, Ch. J.—The question upon this record arises upon the second count of the declaration, in which the plaintiffs declare for contribution against the defendant, the shipowner, in respect of certain timber of the plaintiffs, which was laden on the deck of the defendant's vessel, to be carried on a voyage from Quebec to London, for freight to be paid to the defendant; and the plaintiffs state in this count a certain ancient and laudable custom, touching the loading of timber on board ships engaged in the said voyage, by which custom the shipowners have the liberty and privilege of loading, on the decks of their ships or vessels, a reasonable part of the timber which they are employed to carry on such voyage. And the count then alleges that the timber in question was a reasonable part of the

[\* 141] able custom, touching the loading of timber on \* board ships engaged in the said voyage, by which custom the shipowners have the liberty and privilege of loading, on the decks of their ships or vessels, a reasonable part of the timber which they are employed to carry on such voyage. And the count then alleges that the timber in question was a reasonable part of the

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timber which the defendant was employed to carry upon that voyage, "and was laden on the deck of the ship, in pursuance of and according to such custom." The defendant pleads to this count that there is not any custom that any contribution and general average should be paid on the loss or damage of timber placed on deck and cast overboard; to which plea the plaintiff demurs.

It has been urged in argument by the defendant that the custom stated in the second count has been pleaded without sufficient certainty or formality; but as this objection does not arise upon a special demurrer to the declaration itself, we think no objection in point of form can now be taken; and that the allegation in substance and effect amounts to a statement of a usage and practice of loading ships generally observed upon the voyage in which the vessel was engaged; and consequently, that it must have been known to both the contracting parties, the shipowner and the owner of the timber, who must be taken to have entered into this contract with reference to it.

The question, therefore, before us is, not whether generally the owner of goods laden on deck which are thrown overboard for the preservation of the ship and the rest of the cargo, is entit'el to contribution against the owners of the ship and of the residue of the cargo, but whether in this special and particular case, where the shipowner has laden the goods on deck under a privilege reserved to him by the general usage and practice of the voyage, the owner of the goods may claim contribution from such shipowner.

\* And upon the best consideration we can give to this [\* 142] question, referring, at the same time, to the foreign authorities, and to the few decisions which have taken place in our own Courts, we think the plaintiff entitled in this case to contribution against the shipowner.

The general rule laid down by the foreign authorities, and adopted by our own law, is, as is well known, that all goods thrown overboard for the preservation of the ship and cargo shall be entitled to contribution. Upon this general rule, however, there is engrafted an exception, by the foreign writers, "that goods laden on the deck and cast into the sea shall not receive contribution; saving to the owner of the goods his recourse against the master or shipowner." Consol. del Mare, 183; Ordinance,

No. 84. — *Gould v. Oliver*, 4 Bing. N. C. 142, 143.

liv. 3, tit. 8, art. 13; Emerigon, ch. 12, s. 42; Code de Commerce, art. 421. Now, where the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are, indeed, express on that point. Valin, tit. du Capitaine, art. 12; Consol. del Mare, cap. 183. And the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion. Unless, therefore, the owner of the timber in this case has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss in consequence of his timber having been thrown overboard for the benefit of all; an inference directly at variance with the general rule above laid down, and, indeed, contrary to the authority of the foreign writers. For Valin lays it down that the rule of article thirteen does not apply in respect of boats and other small vessels going [\* 143] from port to port, "where the usage is to \* load merchandises on the deck." The latter words of which text-writer give the reason for throwing such a case out of the exception into the general rule for contribution, at least so far as the ship is concerned.

As to the authorities in the English Courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, whenever it has arisen in our Courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that for goods so laden the underwriters are not responsible. *Ross v. Thwaite*, Park on Insurance, 26; *Backhouse v. Ripley*, ib. But in the case of *Da Costa v. Edmunds*, 4 Camp. 142 (16 R. R. 763), it was left to the jury to say whether there was a usage to carry on deck goods of the description of those thrown overboard; and the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties; but it appears to fall within the same principle of decision.

We think, therefore, the judgment on the second count must be for the plaintiffs.

*Judgment for plaintiffs.*

No. 84.—*Gould v. Oliver*.—Notes.

## ENGLISH NOTES.

In *Burton v. English* (C. A. 1883), 12 Q. B. D. 218, 53 L. J. Q. B. 133, deck cargo was carried, upon a voyage upon which it was proved to be customary to carry deck cargo, and under a charter-party which stipulated (*inter alia*)—"the steamer to be provided with a deck load if required at full freight, but at merchant's risk." The Court of Appeal, reversing the judgment of the Queen's Bench Division, held that the stipulation did not exclude the right of the charterers to recover general average from the shipowners for the loss sustained. This was in accordance with decisions of the Queen's Bench upon the exceptions in a bill of lading: *Schmidt v. Royal Mail Steamship Co.* (1876), 45 L. J. Q. B. 646, and *Crookes v. Allan* (1879), 5 Q. B. D. 38, 49 L. J. Q. B. 201, 41 L. T. 800, 28 W. R. 304. But the reasons given by BRETT, M. R., involve the curious proposition that the claim to general average *does not arise out of contract at all*. If so, as is well pointed out by Mr. Maclachlan (Arnould's *Insur.*, 6th ed., p. 860), the Courts of common law have for the last two hundred years usurped a jurisdiction that does not belong to them. The decision is rested by Lord Justice BOWEN upon a ground more becoming in the mouth of an exponent of English law; namely, that the limitation of liability by the words "all owners' risks" is a stipulation in favour of the shipowners. "The sound principle," he says, "to be applied is that those who make exceptions in their own favour, and to relieve themselves from liability, ought to use clear words. If, therefore, shipowners desire to relieve themselves from liability for jettison, they should do so in clear terms. My judgment proceeds on the basis that the words of this stipulation are not clear enough." If it were necessary further to argue the reasons of BRETT, M. R., it would be sufficient to cite from the judgment of Lord BLACKBURN in *Anderson v. Ocean Steamship Co.* (1884), p. 409, *post*, where he says that the promise to contribute to general average "is one that would be implied by law in every contract for the carriage of goods."

## AMERICAN NOTES.

This case is cited in *Lawson on Usages and Customs*, p. 221; also by Parsons (2 *Marine Insurance*, pp. 219, 223), who says the propriety of carrying goods on deck "should be determined in any case, we think, and certainly so far as the law of insurance is concerned, by the custom." Citing *Rogers v. Mech. Ins. Co.*, 1 Story (U. S. Circ. Ct.), 603, a case of whale blubber stored on deck according to the custom. So of horses on deck. *Browne v. Cornwell*, 1 Root (Connecticut), 60; *The William Gillum*, 2 Lowell (U. S. Circ. Ct.), 154. So in *Hazleton v. Manhattan Ins. Co.*, 12 Federal Reporter, 159; *Wood v. Phoenix Ins. Co.*, 1 Federal Reporter, 235; *Harris v. Moody*, 30 New York, 267, citing

## No. 84.—Gould v. Oliver.—Notes.

the principal case: *Dodge v. Bartol*, 5 Greenleaf (Maine), 286; 17 Am. Dec. 233; *The Delaware*, 14 Wallace (U. S. Supr. Ct.), 604; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pickering (Mass.), 108; *Merchants', &c. Ins. Co. v. Shillito*, 15 Ohio State, 559; 86 Am. Dec. 491; *Gillett v. Ellis*, 11 Illinois, 579; *Toledo Ins. Co. v. Speares*, 16 Indiana, 52.

In absence of custom, goods on deck do not generally constitute a general average loss. See cases cited in last note, *ante*, p. 399; *Lawrence v. Minturn*, 17 Howard (U. S. Supr. Ct.), 114.

The principal case is cited in *Merchants' Ins. Co. v. Shillito*, *supra*, which gives a remarkably exhaustive review of the English authorities, the Court observing: "The general rule before referred to was based on the usages adopted in the navigation of ordinary sailing-vessels; and the reason assigned for the usage not to stow goods on deck, and the rule founded thereon, is, that goods so carried are exposed to greater peril, and enhance the difficulties of navigation, and consequent danger to the ship and cargo. How far a rule of law based upon a usage of ordinary sailing-craft may be applicable to or binding upon vessels propelled and governed by steam is worthy of consideration. If the latter are so constructed and governed that the reason for the usage of the former fails, and the usage ceases, it would seem that the general rule should be so far modified as to make that class of vessels an exception. However that may be, it cannot be doubted that upon principle, where the mode of navigation, or the custom of a particular trade, is such that no usage of the kind upon which the general rule is based, obtains, and that is within the knowledge of the parties, their contracts made in relation to such navigation or trade are presumed to be made with reference thereto, and are not modified by a usage that has no connection with the subject-matter of the contract. Nor would this be inconsistent with the general rule as stated by the American editor of the Exchequer reports in a recent note to *Miller v. Tetherington*, 6 Hurl. & N. 288, based upon numerous American authorities cited, that 'In the absence of any contract, expressed or implied, from some particular custom of trade or navigation, it is settled that the loss or jettison of goods carried on deck creates no claim upon insurers or for general average on the rest of the cargo.' Mr. Phillips, in his treatise, makes substantially the same statement of the rule: sec. 460.

"But the chief difficulties upon which the authorities most differ arise where the policy merely names the article, and it is such as is sometimes carried on deck, and sometimes under, and as to the extent, proof is admissible in relation to particular usages, or the character and extent thereof.

"In analogy to the general principles before referred to, it would seem that if the goods covered by the policy are to be carried on a vessel so constructed, propelled, and managed, that goods may be as properly and safely stowed above as below deck; or if the description of the voyage or character of the goods be such that the underwriter may be presumed to be apprised of a usage to carry them either upon or under deck, the policy will attach to them when so carried. This proposition is substantially what Mr. Phillips, in the section before cited, amidst conflicting authorities, considered to be the result of established principles; and the later decisions support and tend to settle that as the correct rule of law."

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No. 85.—*Anderson v. Ocean Steamship Co.*, 10 App. Cas. 107.—Rule.

In *Harris v. Moody*, *supra*, in the Court below (4 Bosworth, 210), the Court said: “The old rule was established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship; but the introduction of steam into the marine service has wrought great changes in the situation of the motive power, and has rendered the steamboat deck the fitter place for the stowage of cargo. The reason of the rule has ceased, and the rule should perish with the reason.” In the same case, in the ultimate Court (30 New York, 266), the Court reviewed the English authorities, including the principal case, and the Court concluded: “I arrive at the conclusion therefore that the rule laid down by the earlier writers, as applicable to sailing vessels upon a sea voyage, has no relation to the voyage of the steamer *Connecticut*, upon its voyage up the Sound from the port of New York to that at Allyn’s Point; and that if it had, the usage established in this case to stow the goods on deck takes it out of that rule, and brings it within the exception, early recognized and so frequently followed. It results therefore that the vessel and cargo of the steamer became liable to contribute to the loss of the goods jettisoned, notwithstanding the same were stowed upon the deck of the steamer. It may also be observed that the rule is universal that goods stowed on deck, if saved, contribute to the general loss, and it is not perceived on principle why, as they contribute to the general loss, they should not also be entitled to be contributed for when destroyed for the general safety.”

No. 85.—ANDERSON *v.* OCEAN STEAMSHIP COMPANY.

(H. L. 1884.)

## RULE.

WHERE the shipowner pays a just claim of salvage for preservation of ship and cargo, he is entitled (by implied contract) to a general average contribution from the owners of the cargo.

***Anderson v. Ocean Steamship Company.***

10 App. Cas. 107-118 (s. c. 54 L. J. Q. B. 192; 52 L. T. 441; 33 W. R. 433).

*Ship.—General Average Loss.—Liability of Cargo Owner for General [107] Average Contribution.*

When ship and cargo are in peril, the fact that the shipowners have by the act of the master become bound to pay and have paid a sum of money for preservation of ship and cargo, and that the master in so binding them pursued a reasonable course under the circumstances, is not conclusive that the whole sum was chargeable to general average so as to bind the cargo owners to pay their proportion.

## No. 85. — Anderson v. Ocean Steamship Co., 10 App. Cas. 107, 108.

The decision of the Court of Appeal reversed and a new trial ordered on the ground that the question of the amount chargeable to general average ought to have been submitted to the jury.

### Appeal from an order of the Court of Appeal.

The facts proved at the trial of the action are set out at length in the report of the decision below (13 Q. B. D. 651).

For the purposes of the present report the following brief statement will suffice.

On the 2nd of June, 1880, the respondents' ship, *Achilles*, grounded on a sandbank on the river Yangtsze. After some time the master signalled to the *Shanghai*, which vessel passed a hawser to the *Achilles*, and towed her, and eventually the *Achilles* came off the bank. On the 6th of June an agreement was drawn up between and signed by the master of the *Achilles* on behalf of his ship and owners, and the master of the *Shanghai* on behalf of his ship and owners. The agreement was on a printed form, and was dated the 2nd of June, and framed as if the *Achilles* were still on the bank. It bound the master of the *Shanghai* to use his best endeavours to get the *Achilles* off by towing; the towage service not to exceed twenty-four hours, after which the *Shanghai* was to be at liberty to leave the *Achilles* whether afloat or not;

if the *Achilles* was towed off in less than twenty-four [\*108] hours the towage \* service to be considered complete;

it bound the master of the *Achilles* whether towed off or not to pay the master of the *Shanghai* 10,000 taels, and to pay for all damage to the *Shanghai*, her tackle, &c. There was evidence that the *Shanghai* never assisted for a less sum. A long correspondence ensued between the respondents as owners of the *Achilles* and the owners of the *Shanghai*, and eventually the respondents paid the owners of the *Shanghai* £2691 19s. 6d., consisting of the 10,000 taels and further sums for commission and repairs to the *Shanghai*.

The respondents claimed to treat this as a general average loss, and brought an action against the appellants as owners of part of the cargo in the *Achilles* to recover £162 11s. 7d. as their general average contribution, their proportion having been estimated at that sum by a general average adjuster. The appellants denied that there had been a general average loss, and denied their liability for the amount claimed, or for any amount. Further,

## No. 85.—Anderson v. Ocean Steamship Co., 10 App. Cas. 108, 109.

they paid into Court £75 as enough to satisfy the plaintiffs' claim (if any) for general average.

At the trial the following questions were put by CAVE, J., to the jury; viz., 1. Did the master of the *Achilles* by his act make his owners liable to pay the 10,000 taels, or, in other words, did he signal the *Shanghai* to his assistance, knowing her terms? 2. Was that a reasonable course for him to pursue, under the circumstances? 3. Was the commission charged a reasonable commission? 4. Were the repairs charged for and done to the *Shanghai* reasonable?

The jury answered the above questions in the affirmative, and under the direction of the learned Judge found a verdict for the plaintiffs for the amount claimed, less the amount paid into Court, and CAVE, J., gave judgment for that amount.

The Queen's Bench Division (GROVE, LOPES, and MATHEW, J.J.) set aside the judgment for the plaintiffs and entered judgment for the defendants on the ground that there was no reasonable evidence for the jury of the agreement upon which the claim was based. The Court of Appeal (BRETT, M. R., BAGGALLAY and BOWEN, L.J.J.), on the 21st of December, 1883, made an order reversing that decision and entering judgment for the plaintiffs (13 Q. B. D. 651).

\* From this order the defendants appealed. [\* 109]

Nov. 14, 17, 18. Sir F. Herschell, S. G., and Cohen, Q. C. (J. Gorell Barnes with them), for the appellants:—

The judgment of the Court of Appeal was wrong. The respondents were not obliged or compellable to pay the 10,000 taels for the services. The *Achilles* was, no doubt, in danger, and for the services rendered the *Shanghai* would be entitled to a *quantum meruit*. But they were rendered under circumstances showing that there was no agreement to pay the 10,000 taels. The alleged consideration for this agreement could not have been enforced against the *Shanghai*, that is, the remaining for twenty-four hours to assist. Therefore the agreement was invalid. These were not "salvage services," the essence of a salvage service being that the salvor gets nothing if he does not save, and a large sum if he does. This agreement is for a very different thing, for services at the most for twenty-four hours only, though the ship might at the end of that time be in extreme danger; the 10,000 taels were to be paid, however short or slight the services might be. Such an

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agreement cannot bind cargo owners, who were not consulted as to the payment. The jury have not found a contract; only the state of mind on the part of the captain. The *Achilles* could not have brought an action for breach of contract. If the *Shanghai* had sued in the Admiralty Court for salvage on a *quantum meruit* the *Achilles* could not have defended on the ground that the *quantum meruit* was ousted by the agreement. If there was no agreement in fact, the shipowners were not bound. If there was an agreement in fact, it did not bind the cargo owners; for 1. It was not a salvage agreement, payment being due in any event; 2. It was unreasonable; 3. The shipowners would not have been compelled to pay.

Such an agreement is against public policy, and if binding on the ship could not bind cargo. It would not be treated as binding in the Admiralty Court, which has always given protection against exorbitant demands, even when agreed to, and in estimating the amount takes into consideration all the circumstances of the case. *The Hector*, 3 Hagg. Adm. 95, per Sir J. NICHOLL; [\* 110] *The Clifton*, 3 Hagg. Adm. 120; *The \* Glenduror*, L. R. 3 P. C. 592, per JAMES, L. J.; *The Medina*, 1 P. D. 272, 2 P. D. 5; *The Waverley*, L. R. 3 A. & E. 369. A salvor is entitled to a lien on the goods salved for his remuneration: Abbott on Shipping, 12th ed., Salvage, Part VI. ch. 2, p. 537; but he has no right to sue for remuneration except in the Admiralty Court. *Nicholson v. Chapman*, 2 H. Bl. 257 (3 R. R. 374), and *Newman v. Walters*, 3 Bos. & P. 612 (7 R. R. 886), were not really cases of salvage, though so treated. The shipowners having paid the whole when they might have got off for less, cannot charge any part on the cargo owners; and if the latter escape liability altogether in consequence, that is the fault of the shipowners, who had no power to bind the cargo owners.

H. Matthews, Q. C., and G. Bruce, Q. C. (H. D. Greene with them), for the respondents, were requested to confine their arguments to the points: 1. Whether the agreement was against public policy? 2. Whether it was, under the circumstances, binding on the cargo owners? 3. Whether it was reasonable?

The agreement was binding on the shipowners, and, if so, payment under the compulsion of the agreement was the same thing as if the money had been paid down at the time, and gave rise to a general average contribution. The test is, Was it judicious to

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make the sacrifice at the time? The agreement, in fact, bound the owners. *Arthur v. Burton*, 6 M. & W. 138; *Beldon v. Campbell*, 6 Ex. 886. A reasonable necessity existed in this case, and the sum paid was not, in fact, unreasonable under the circumstances, as appears from the evidence. Whether an expenditure gives rise to a general average contribution depends upon whether it was judicious or not. *Birkley v. Presgrave*, 1 East, 220 (6 R. R. 256); *Kemp v. Halliday*, 6 B. & S. 723, L. R. 1 Q. B. 520, per BLACKBURN, J., affirmed in the Exchequer Chamber; *Moran v. Jones*, 7 E. & B. 523.

[Lord BLACKBURN. — The point is, Was the case properly left to the jury? and have they found that the payment was reasonable as against the cargo owners?]

\* In finding it reasonable as to the ship, they have found [\*111] it reasonable as against all parties. The *Shanghai* was herself in danger, and incurred loss. As to what is a reasonable amount to pay in such a case, see *The Waverley*, L. R. 3 A. & E. 369; *The Minnehaha*, Lush. 335, 15 Moo. P. C. 133; *The Medina*, 1 P. D. 272, 2 P. D. 5. The cargo owners are bound if the agreement was reasonable and proper; for, if so, it was a sacrifice for the general good. No doubt if the *Shanghai* had towed for twenty-four hours without result it would not have been a general average loss; but here the service has benefited ship and cargo, and there is nothing to take it out of the rule of general average. The *Achilles* could not have got off the bank at less expense, nor have set aside the agreement afterwards. The agreement was not in itself inconsistent with this being a salvage service, for salvage may become due even if the services are unsuccessful. There is no case of salvage in which ship and cargo have been distinguished, for the Admiralty Court has no jurisdiction over general average contribution. This was, in fact, a salvage agreement as understood in Admiralty. *The Undaunted*, Lush. 90; *The Melpomene*, L. R. 4 A. & E. 129; *The E. U.*, 1 Ad. & Ec. 63. The ship was in peril, requiring immediate assistance, and the agreement to pay 10,000 taels was reasonable under the circumstances. See Abbott on Shipping, 3rd ed., p. 339, s. 10, and the case there cited of a ship putting into port to avoid capture.

A payment for the general good stands on the same footing as a material sacrifice; the only question is, Was it a reasonable thing

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to do? If the services had not been successful the ship would have borne the whole burden. This was not a case of extortion as in *The Helen and George*, Swab. 369. The burden of proof is on those who seek to set aside the agreement. Where the salvor is in danger she is entitled to substantial payment. *The Phantom*, L. R. 1 A. & E. 58. — The question of public policy is covered by the finding of the jury on the question of reasonableness.

Cohen, Q. C., in reply.—The agreement is inconsistent with the principles of salvage as administered in the Court of [\*112] Admiralty. \* *The City of Chester*, 9 P. D. 182; *The De Bay*, 8 App. Cas. 559. One party cannot fix an amount without any reference to the circumstances. The learned Judge did not call attention to the form of the agreement, which was inequitable on the face of it. It would have been invalid against the shipowners if they had not subsequently ratified it. If it was in its nature a salvage agreement, it should be dealt with according to the Admiralty rules relating to salvage agreements, under which it could not have been enforced.

The House took time for consideration.

Dec. 5. Lord BLACKBURN:—

My Lords, the first paragraph of the statement of claim is as follows:<sup>1</sup>—

"In consideration that the plaintiffs, at the request of the defendants, had taken on board a ship of the plaintiffs, called the *Achilles*, certain goods of the defendants to be carried on board of the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion in respect of the said goods of any general average loss that might arise or happen to the ship during the said voyage." The statement then proceeds to aver that the ship with the goods on board took the ground, and that the ship and cargo were in danger of perishing, and that "her master and crew were unable to rescue the said ship or the said cargo from the said danger; help and assistance were obtained, and were necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay, £2691 19s. 6d.; and that the ship and cargo were by means of the said help and assistance preserved." If there was a general average to which the defendants were to contribute, it is not now

<sup>1</sup> The statement of defence admitted the allegations in the first paragraph, but denied all the rest of the claim.

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in controversy that the defendants' proportion of £2691 19s. 6d. would be £162 11s. 7d., and for that sum the action was brought. There can, however, be, I think, no doubt that the plaintiffs are not tied down to recover that exact amount or nothing. If it was proved that \* there was a claim for general average, [ \* 113] but that the amount for which the claim was made out was less than £2691 19s. 6d., the plaintiffs might still recover the proper percentage of that amount actually made out.

The defendants, by their statement of defence, put the plaintiffs on proof of everything; and contended, and I rather think still contend, that the plaintiffs are not entitled to recover anything. But they seem to have had doubts upon that subject, and therefore bring £75 into Court. What the effect of this mode of pleading might be on the costs I do not stop to inquire. It certainly shows, to my mind, that besides the issue, whether there was a general average at all, there was a serious issue as to what the amount was to which the cargo had to contribute as a general average.

I may as well clear away a matter of prejudice. If any one is insured in the ordinary form, his insurers would have to indemnify him for general average. It is, therefore, usual enough for a merchant who is insured to hand over the defence to his insurers; if they can make out that the merchant is not liable at all, there is no claim on the insurers; if they can make out that the amount payable is less than demanded, the claim on the insurers is less. I think it very likely that in this case insurers are defending the action in the name of the defendants, though I do not know that it is so; but that makes no difference in the law, and should make none as to the findings of fact. No more contribution is exigible from the owner of a parcel of goods that are insured than from the owner of a parcel that is not insured.

On the trial, evidence was produced on behalf of the plaintiffs only, the defendants calling none. At the close of the case it was submitted that there was no case, and various objections were taken. One of these I may now notice. There was evidence—I do not now say more—that not only the ship, but also the cargo, were exposed to a peril from which the master and crew were unable to rescue her; that the assistance of the *Shanghai* was requested and was granted; and there was evidence that by the assistance of the *Shanghai* the ship and cargo were saved from

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that peril. Mr. Cohen's objection, if I understood him rightly, was that, assuming all to be true which this could prove, [\* 114] \* it would show a claim of salvage for which the owners of the *Shanghai* might have brought a suit in the Court of Admiralty against the ship and cargo, and that in that Court the amount of the fair reward would have been decided by the Judge of the Admiralty, having consideration as to everything; the peril to the *Shanghai*, which does not seem to have been great, being one element, and the sum which the owners of the *Shanghai* in all cases demanded being another, but not a conclusive one. But I think this was not a tenable point. The owners of the *Achilles* paid the amount demanded by the *Shanghai* as a disbursement; after they had been paid, the owners of the *Shanghai* could not have brought any suit. And I think it would be a very unjust rule of law that the cargo owners should go free from a payment which they might have been forced to make to the *Shanghai*, because the owners of the *Achilles* did not put the *Shanghai* to a suit in the Court of Admiralty, but, rightly or wrongly, paid as a disbursement the whole amount demanded. I do not think that the owners of the *Achilles* could, by paying the claim of the *Shanghai*, entitle themselves to recover more from the goods owners than the *Shanghai* could have recovered in a salvage suit against the goods owners, but I do not see why they might not recover whatever it was fair and just should be paid as a contribution.

General average, as is explained in Abbott on Shipping, Part III., chapter 8 (page 342), of the fifth edition, the last published in Lord TENTERDEN's life, is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison; but its principle applies, and it has been applied, to all other cases of voluntary sacrifice for the benefit of all, that is, if properly made. Those things which are actually saved in the sense explained in Abbott on Shipping, Part III., chapter 8, sect. 13, fifth edition, p. 355, must contribute.

In *Kemp v. Halliday*, 6 B. & S. 746, I said: "In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy; but an extraordinary expenditure incurred for

[\* 115] \* that purpose is as much a sacrifice as if instead of money being expended money's worth were thrown away. It

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is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true that so long as the expenditure by the shipowner is merely such as he would incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average." And I may observe that in the specimen of an adjustment given in Abbott on Shipping, Part III., chap. 8, sect. 16, p. 359, 5th edition, and sanctioned by Lord TENTERDEN's high authority, one of the items allowed is "expense of bringing the ship off the sands, £50." That item must have been a disbursement to pay for services hired.

I think that the promise stated in the first paragraph of the statement of claim is one that would be implied by law in every contract for the carriage of goods. The shipowners have, I think, a lien till the contributions are paid or secured. The goods owner may raise the question whether any, and if any, what contribution is due, by offering to pay what, if anything, he admits to be due; demanding the goods, and if refused bringing trover; and so raising the question whether he has been ready and willing to pay enough. But I see no reason why the same question should not be raised in this form of action. Questions of this sort are generally more conveniently settled by average adjusters as arbitrators, or by stating a case on any question of law, on which the opinions of average adjusters differ; but the action having been brought must be disposed of.

I have come to the conclusion that, on the evidence given at the trial, it was not a simple issue whether the whole sum actually paid by the shipowners to the owners of the *Shanghai* was chargeable to general average, and, if that was not made out, that nothing was to be recovered.

I do not think that it would follow merely from the shipowner having become liable to pay, and having paid that sum, that the whole of it was chargeable to general average. I think it might well be that on this evidence the proper conclusion was that something differing from that sum might be chargeable, and I think that, till it is ascertained whether any sum was chargeable, and what that sum was, the case is not ripe for decision. And I \* do not think that the answers by the jury to the ques- [\*116] tions asked by the learned Judge at the trial suffice to enable this House to solve that question.

## No. 85.—Anderson v. Ocean Steamship Co., 10 App. Cas. 116, 117.

I have therefore come to the conclusion that neither the judgment given by CAVE, J., in favour of the plaintiffs for the whole amount, nor the order of the Divisional Court entering judgment for the defendants, nor the order now appealed against restoring the judgment below, can be supported, and that the only course that can be adopted by this House is to order a new trial.

The principles on which I come to this conclusion have not often been discussed in a Court of law; they probably often come before average adjusters, and are of great importance.

The contract of the shipowner is to carry on the goods to their destination. In *Beldon v. Campbell*, 6 Ex. 886, 889, it is said by PARKE, B., with, I think, perfect accuracy, "There is no doubt of the power of the master by law (but some as to what extent it goes) to bind the owner. The master is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has as incident to that employment a right to bind his owner for all that is necessary, that is, upon the legal maxim, 'quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.'" And I think that if the question here raised had been whether the owners of the *Achilles* were bound by a contract made by their master to pay the owners of the *Shanghai* the sum in question, the first questions asked by CAVE, J., would have been perfectly right. I do not, however, think that on the evidence any question of the authority of the master to bind his owners really was raised. The two sets of shipowners had a common agent, Drysdale, Ringer, & Co., and I should rather conclude that Drysdale, Ringer, & Co. were the persons who, on behalf of the owners of the *Shanghai*, agreed to send out the *Shanghai* to help the *Achilles* as soon as the master of the *Achilles* signalled that he wanted help, and that the amount of remuneration to be paid by the owners of the *Achilles* to the owners of the *Shanghai* was not discussed or settled between the captains at all, but was settled

in the first instance by Drysdale, Ringer, & Co., and after-  
[\* 117] wards the two sets of shipowners ratified and \*agreed on  
what they settled. I think, therefore, that it was quite  
clear that there was a contract binding on the owners of the  
*Achilles* to pay this sum of £2691 19s. 6d. to the owners of the  
*Shanghai*, whether it was made by themselves or by their master  
for them is, as far as regards the binding of the owners of the  
*Achilles*, unimportant. But neither the owners of the ship nor

## No. 85.—Anderson v. Ocean Steamship Co., 10 App. Cas. 117, 118.

their master have authority to bind the goods, or the owners of the goods, by any contract. The master has, I think, authority to make for his owners all disbursements which are proper for the general purposes of the voyage, and when once those disbursements are paid for, either by the master out of funds belonging to the owners which the master has, or by funds which the owners themselves apply to discharge a contract which they either could not dispute because the master had bound them to make it, or did not choose to dispute, I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But I think that there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average. And though I quite agree that there is some evidence here that the *Achilles* and her cargo were both in danger, and were both saved by the services of the *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury.

It seems to me that if such a question had been submitted to a jury, there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured. If they thought the charge was against underwriters, there is a common enough impression, not confined to jurymen, that the underwriters' trade is such as to make it right to be liberal in deciding any doubtful question against them. I do not think this ought to influence, but it might do so. I cannot, however, find that the opinion of the jury was taken at all as to the amount. On a new trial that question may be raised, and it may be a subject of  
\* great difficulty to say what evidence bears on it, and [\* 118] what the proper directions to the jury should be. I think it better not to prejudice the question further than by saying that the fact that the owners of the *Achilles* had, by contract, made either by their master or by themselves, become bound to pay this sum, and had paid it, is not, I think, conclusive that the whole of it was chargeable to general average, though part of it may be.

If your Lordships agree in this opinion, I think that the order

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No. 85.—Anderson v. Ocean Steamship Co., 10 App. Cas. 118.—Notes.

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of this House should be for a new trial, and that all the costs of the trial, and in the Divisional Court and in the Court of Appeal, are thrown away; and that as neither party can be said to have succeeded in this House, each party should bear his own costs in this House.

I therefore move accordingly.

EARL OF SELBORNE, L. C.:—

My Lords, I agree in the opinion which has just been delivered by my noble and learned friend, and do not desire to add anything to it. The way in which I propose to put the question to the House is this: that the order appealed from be reversed except so far as it rescinds the order of the Queen's Bench Division to enter judgment for the defendants; that the case be remitted to the Court below with directions for a new trial; and that there be no costs of the appeal.

Lord WATSON:—

My Lords, I concur, and have nothing to add to what has been said by my noble and learned friend, Lord BLACKBURN.

*Order appealed from reversed except so far as it rescinds so much of the order of the Queen's Bench Division as ordered judgment to be entered for the defendants. Cause remitted to the Court below with directions for a new trial.*

Lords' Journals, 5th Dec. 1884.

#### ENGLISH NOTES.

It is not necessarily implied by the above judgment that if no agreement had been made as to the amount of compensation, there would have been a direct claim by the salvors against the shipowners in respect of the cargo saved. This is made clear by the judgment of the PRESIDENT, Sir J. HANNEN, in *The Raisby* (1885), 10 P. D. 114, 117, 54 L. J. P. D. & A. 65, 53 L. T. 56, 33 W. R. 938. But where a master of a ship in distress makes an agreement, which is neither unreasonable nor inequitable, for the payment of a definite sum for salvage services, it has been held by BUTT, J., that the owners of the salved ship are liable in the first instance for the whole amount agreed to be paid. This view he considered to be supported by some of the *dicta* in the above judgment of Lord BLACKBURN. *The Prinz Heinrich* (1888), 13 P. D. 31, 57 L. J. P. D. & A. 17, 58 L. T. 593, 36 W. R. 511.

## No. 85.—Anderson v. Ocean Steamship Co.—Notes.

## AMERICAN NOTES.

This principle is found in *Bedford Com. Ins. Co. v. Parker*, 2 Pickering (Mass.), 1; 13 Am. Dec. 388 (approved in *McAndrews v. Thatcher*, 3 Wallace (U. S. Supr. Ct.), 367; *Barnard v. Adams*, 10 Howard (U. S. Supr. Ct.), 270 (wages of crew allowed after the ship was stranded and while they were occupied in saving the cargo); *Bevan v. Bank of U. S.*, 4 Wharton (Penn.), 301; 33 Am. Dec. 64 (distinguished in *McAndrews v. Thatcher, supra*); *Gray v. Waln*, 2 Sergeant & Rawle (Penn.), 229; 7 Am. Dec. 642; *Heyliger v. N. Y. F. Ins. Co.*, 11 Johnson (N. Y.), 85; *Barker v. Balt. & Ohio R. Co.*, 22 Ohio State, 45; 10 Am. Rep. 726; *Leavenworth v. Delafield*, 1 Caines (N. Y.), 573; 2 Am. Dec. 201. In the last case it was held that wages and provisions necessary for the support of the crew during the detention of the vessel captured and carried in for adjudication, are proper subjects of general average. The editor, in a note, 2 Am. Dec. 207, says this doctrine is "very much questioned." In *Gray v. Waln, supra*, the Court said: "The law of average is founded on policy and on equity. On policy, because there are men who would risk the loss of life and fortune rather than sacrifice their property without compensation: On equity, because nothing can be more reasonable than that the property saved should contribute to make good the loss which was the cause of safety. It is to be understood that this loss was incurred voluntarily, in time of imminent danger, with a view to the general good, because without these concurring circumstances there would be neither policy nor equity in contribution. It is to be understood, too, that the object in view, that is, the preservation of ship and cargo, has been in whole or in part effected. If goods are thrown overboard to lighten the ship, notwithstanding which she is wrecked, neither the ship nor the goods which happen to be saved shall contribute, because they were not saved by means of the jettison. But if the jettison preserves the ship and cargo from the impending danger, and afterwards the ship is wrecked in consequence of a new peril, what is saved of the cargo shall contribute, because it would not have been saved but for the jettison. It appears to me that some confusion has taken place in the law respecting average, from not attending to the distinction between cases of jettison and running the ship on shore. In case of a jettison, the object in view is not attained unless the ship is saved; the goods which chance to be saved are not saved by means of the jettison. The reason for contribution therefore fails. But where the ship is run on shore, the object in view, so far as concerns the cargo, may be completely obtained, though the ship be totally lost; because the goods are saved by means of the loss of the ship."

In *Barker v. Balt. & O. R. Co., supra*, the question was seamen's wages and subsistence in respect to general average, and it was held that they were a proper claim, overruling earlier Ohio cases, and observing: "These early decisions followed the rule then recognized, and probably still adhered to by the English Courts. But they are, as intimated by the learned Judge who announced the opinion of the Superior Court, at variance with the settled law on the subject in this country, and should be modified to harmonize therewith, and with the modern maritime usages of Western navigators and underwriters.

No. 86.—*Simonds v. White*, 2 Barn. & Cress. 805.—Rule.

“ We cannot perceive why, on principle, expenses for seamen’s wages and subsistence, incurred pending an extraordinary peril, should not be treated as extraordinary sacrifices. We therefore think the American doctrine, as laid down by elementary writers, and generally recognized in the adjudicated cases, maintains the better rule. Abbott on Shipping, 601; *Barnard et al. v. Adams et al.*, 10 How. (U. S.) 307; *The Star of Hope*, 9 Wall. (id.) 236. In the case last cited, the Court say: ‘ Whatever the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing part of it, or in voluntarily stranding the vessel, the wages and provisions of the master, officers, and crew, from the time of putting away for the port of succor, and every expense necessarily incurred during the detention, for the benefit of all concerned, are general average.’ ”

In the *Heylinger* case, cited above, a vessel was wrecked and lost, but the cargo was saved by lighters, and it was held that the expense of this salvage was proper subject of general average. The Court said: “ The general contribution is founded on the most equitable principles. The expenses were incurred for the common benefit.”

No. 86.—SIMONDS *v.* WHITE.

(K. B. 1824.)

## RULE.

GENERAL average claimed by the owner of the ship against cargo is (*prima facie*) to be adjusted at the port of discharge according to the law of that place.

**Simonds and Loder v. White.**

2 Barn. &amp; Cress. 805-813 (26 R. R. 560).

*General Average.—Adjustment at Port of Discharge.*

[805] A loss by general average is to be calculated between owner of ship and the owner of goods according to the law of the port of discharge.

Assumpsit for £106 3s. 6d., as money paid by the plaintiffs to the use of the defendant. At the trial before ABBOTT, Ch. J., at the London sittings after Hilary Term, 1823, a verdict was found for the plaintiffs subject to the opinion of the Court upon the following case:—

The plaintiffs are British subjects, having a mercantile establishment in London where Simonds resides, and at St. Petersburgh where Loder resides, under the permission of the Russian government. The defendant is also a British subject, and the owner of

No. 86.—*Simonds v. White, 2 Barn. & Cress. 805—807.*

the British ship *Mamhull*, which was chartered at Gibraltar on the 15th \* of March, 1820, by W. Cozens & Co., who [\*806] are British subjects residing at Gibraltar, for a voyage from Gibraltar to touch at the Isle of Wight for orders, and then to proceed immediately, if so directed, to St. Petersburgh. The vessel sailed on the voyage from Gibraltar on the 20th of March, 1820, with a cargo on board, for which bills of lading were there signed in the following form deliverable at St. Petersburgh: "Shipped in good order and well conditioned by W. Cozens and Co., in and upon the good ship called the *Mamhull*, now riding at anchor in Gibraltar bay, and bound for St. Petersburgh (enumeration of the goods and their marks, weights, &c., here follow), being marked and numbered as in the margin, which are to be delivered in like good order and well conditioned at the aforesaid port of St. Petersburgh (the dangers of the sea only excepted), unto        or        assigns (afterwards filled up unto M. W. Simonds and Co. (the plaintiffs), or their assigns), he or they paying freight for the said goods as per charter-party, with tonnage and average accustomed."

On the arrival of the vessel at the Isle of Wight, the plaintiffs purchased the cargo from the agents of Cozens & Co., and the ship afterwards proceeded on to St. Petersburgh. In the course of the voyage she struck on a reef of rocks off the island of Lessoe, when the long-boat was got out, and the small bower cable and anchor were carried out to endeavour to get her off; but the tide being strong, it drifted the vessel on to the cable, which was thereby rendered useless and unfit for service. Assistance was procured, and the vessel got off; she put into Elsineur, where the master purchased a new cable, and the vessel finally completed the voyage and delivered the cargo in safety under the aforesaid bill of \* lading. When the vessel arrived at [\*807] St. Petersburgh, a statement of general average on the voyage, according to the Russian laws upon that subject, was made up and settled by an officer appointed for that purpose by the Russian government, called the Dispacheur. In that statement was included as a charge upon the cargo for general average the sum of £106 3s. 6d. for the cost of the new cable beyond the old one, surveying the old cable, weighing and getting the new cable on board, the duty payable on the foreign cable when brought into England, and the new cable's proportion of the above charges,

No. 86.—*Simonds v. White, 2 Barn. & Cress. 807, 808.*

which are admitted to be general average according to the laws of Russia; and the plaintiffs were called upon to contribute to general average so calculated, and by the laws of Russia they were obliged to pay the sum demanded in order to get possession of the cargo. The cargo of the *Mamhull* was insured by a policy effected in London, the underwriters upon which refused to allow the cable and the charges connected with it as part of the loss. On the 21st of February, 1821, the plaintiff, Simonds, wrote a letter to the defendant demanding payment of the said sum of £106 3s. 6d. The case was argued in the last term by

F. Pollock for the plaintiff.—The general average ought to have been calculated according to the laws of England and not according to the laws of Russia, and the defendant having claimed and received the money on grounds not tenable, and the plaintiffs having been compelled to pay it in order to obtain their goods, the sum so paid may be recovered back in an action for money had

and received. The question is to be decided on the same [\*808] principle as if the defendant was now \* suing for average

in an English Court of justice. All the parties to the contract were British subjects, and the ship was a British ship. In *Power v. Whitmore*, 4 M. & S. 141 (16 R. R. 416), it was decided that the insurer of goods shipped to a foreign country was not bound to indemnify the assured, a subject of that country, against general average, which by a decree of a Court there he was obliged to pay, but which, by the law of this country, he was not liable to pay; and Lord ELLENBOROUGH in that case says, that “the contract must be governed in point of construction by the law of England, unless the parties have contracted on the footing of some other known general usage among merchants relative to the same subject.” The accident in this case happened before the vessel reached the Russian dominions, and it ought to be considered with reference to this question in the same light as if it had happened in the river Thames, and then it is quite clear that the average must have been calculated according to the law of this country. In this case it does not appear that when the vessel left Gibraltar, it was settled that she was to go to St. Petersburgh as the place of her final destination; she was only to go there if so directed.

Whately, *contra*.—The decision in *Power v. Whitmore* does not govern the present case. The question there arose upon a policy of insurance, an instrument in general and familiar use, and

## No. 86.—Simonds v. White, 2 Barn. &amp; Cress. 808-810.

of known meaning in England, and upon a contract which could only be enforced in this country. Here the question arises upon a bill of lading, and the payment of average, if any should become \* due, is implied by the general law merchant. [\* 809] In that case, too, the question arose between the underwriter and the owner of the goods; in the present, it arises between the owner of the ship and the consignee of the goods, and the rights and liabilities of the one are very different from the rights and liabilities of the other. In that case it was not stated that the average was settled according to the law of the place where the adjustment was made; in the present case it is so stated. Now it is quite clear that by the general law and custom of merchants, as appears by the most celebrated works on marine law of this and other countries, the master of a ship has a lien upon the goods at the port of discharge for any average which may become due during the voyage. Consulat de la Mer, Paris edition, 1808, section 225; Complete Body of Sea Laws, section 33, article 31; Wellwood's Abridgement of Sea Laws, edition 1613, tit. 21, page 47; Bynkershoek Questiones Juris Privati, liber 4, c. 24; Malyne's Lex Mercatoria, 3rd edition, page 113; Beawes's Lex Mercatoria, edition 1813, tit. Average, p. 245; Ordinance of Lewis the Fourteenth, book 3, tit. 8, Du Jet., article 21; Abbott on Shipping, 257. The parties, therefore, in this case must be supposed to have contracted upon this understanding. And if the master has a lien at the port of discharge, it seems to follow as a necessary consequence that the average must be calculated and adjusted according to the law which prevails there, for it would be absurd to suppose that he can have a lien at the port of discharge for average which is to be calculated according to the law of another country. In this case the bill of lading mentions that the vessel is bound to St. Petersburg, and it was therefore known to \* the parties to the contract, that [\* 810] if an average loss occurred upon the voyage, it must be adjusted at that place.

*Cur. adv. vult.*

ABBOTT, Ch. J., now delivered the judgment of the Court. The question in this case is, whether the plaintiffs, the proprietors of certain goods carried on board the defendant's ship from Gibraltar to St. Petersburg, and who were compelled at St. Petersburg to pay to the defendant, in order to obtain possession of their goods, a sum

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of money as a contribution to a general or gross average, settled at St. Petersburg according to the law of Russia, can recover back so much of the money thus paid as would not have been charged to them on an adjustment of average made according to the law of England, the ship being a British ship, and all the parties British subjects. And we are all of opinion that the plaintiff's cannot recover back this money.

On the part of the plaintiff's it was contended that the case must be considered exactly as it would be if the defendant were now suing for average in a British Court. The authority cited for the plaintiff's is the case of *Power v. Whitmore*. That case, however, cannot govern the present, for two reasons,— first, because it arose between different parties, and on a different species of contract, namely, a policy of assurance ; and, secondly, because in the opinion of the Court the facts there stated did not show that the average had been adjusted according to the established law and usage of the country wherein the adjustment was made : whereas [ \* 811 ] the present case arises between a shipper, or rather his assignee and \* the shipowner, and it is an admitted fact that the average was adjusted according to the law of Russia.

The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract ; but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree ; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo. I believe also, that all are agreed on another point ; namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them shall be either paid or secured to his satisfaction. This appears by the case to be the law of Russia. This power is noticed in the civil law, Dig. lib. 14, tit. 2. 2. It is

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expressly given in the Consulat, c. 98, recognised by Cleirac in his commentary on the Jugemens d'Oleron, p. 35, and allowed by the French Ordinance of Marine, tit. Du Jet. art. 21. If then the average is to be adjusted at the place of destination, by what law shall it be adjusted?

One may suppose the case of a British ship carrying to a foreign port the goods of British subjects only, and \* delivering them to British subjects there. But such a [\* 812] case will rarely occur: some, at least, of the consignees of the goods will usually be foreigners. The present is not found to be a case of that singular description, and must therefore be taken to be of the usual kind. And where there are several shippers, even if all are British subjects, it will, in the case of jettison, be for the interest of the person whose goods have been lost that the master should exercise his power of detention in order that the expense and inconvenience, and delay of actions and suits, may be avoided. And if, as in the present case, the original loss has fallen upon the ship, the master may certainly exercise that power for his own safety which, in other cases, he ought often to exercise for the safety of other persons. Now, if the goods belong entirely to the persons of the nation where the ship has arrived, they cannot with any reason complain of an adjustment made under the authority of their own law. In such a case it would hardly be contended, that as between them and the master, or between some and others of them, the adjustment ought to be regulated by any other law than their own. Then suppose, which will perhaps be the most usual case, that the goods belong to persons of different nations, the adjustment must be made either according to some one law regulating the whole, or it must be made in parts, according to as many different laws as there happen to be persons of different nations concerned in the adventure. The latter mode would be attended with great confusion, perplexity, and inequality, even if it should be found practicable, which in many cases it would not be. In this case also, therefore, the law of the country must prevail. And this will not impugn any known doctrine \* or [\* 813] rule of the English law. The shipper of goods, tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average he must be understood to assent also to its adjustment, and

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No. 86.—*Simonds v. White*, 2 Barn. & Cress. 813.—Notes.

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to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made. I am to be understood as speaking of a case depending upon general rules and reason, and not upon a special or particular contract. It is of infinite importance to maritime commerce that its regulations should be as simple and as few in number as general justice will permit. The wisest and most equitable rules may occasionally, in a particular case, be productive of an inconvenience; but such occasional and particular inconvenience is a much less evil than the confusion and uncertainty that never fail to accompany a multiplicity of minute regulations. For these reasons we are of opinion that the defendant is entitled to our judgment.

*Judgment for the defendant.*

#### ENGLISH NOTES.

The above case clearly shows the principle as implied in a contract of carriage of goods. See also *Lloyd v. Guibert*, No. 12 of "Conflict of Laws," and notes, 5 R. C., p. 869 *et seq.* How far the implication extends to an ordinary policy of insurance of the goods is a question.

In *Newman v. Cozalet* (cited in Park Insur., and also in Arnould Insur., 6th ed. p. 912), the assured, owner of goods, had been compelled to pay, under a foreign adjustment settled at Pisa, in respect of losses, which would not have been general average in this country, and upon contributory values differently computed from what they would have been here; yet as it clearly appeared in evidence that all the losses allowed were general average at Pisa, and that the apportionment was correct according to the mercantile usage of that place, the assured was allowed to recover against his underwriter the full amount of his claim. And in *Walpole v. Ewer* (cited also by Park Insur. and in Arnould, 6th ed. p. 913), the holder of a *respondentia* bond (on a Danish ship), not liable to general average at all in this country, was compelled to pay a contribution under a foreign adjustment, settled in Denmark; and upon evidence given that it was in accordance with the law and practice in Denmark, he recovered against the underwriters.

In *Power v. Whitmore*, 4 M. & S. 141, 16 R. R. 416 (referred to in the principal case), a ship bound from London to Lisbon carrying goods insured for the voyage in the ordinary way, was obliged by stress of weather to put into Cowes, and the owners were put to considerable expenses for delay, pilotage, &c. There was no voluntary

№. 86.—*Simonds v. White.*—Notes.

sacrifice of anything for the general benefit, and clearly no ground, by English law, for a claim by the shipowners against the goods for general average. But on arriving at Lisbon the master of the ship instituted proceedings in the Courts there against the proprietors of the cargo, and obtained a decree according (as it was recited) to the practice at Lisbon, for a general average contribution, which the owners of the goods were obliged to pay. It may be inferred, though it is not stated, that the payment was enforced by way of lien upon the goods. The sum so paid to the shipowners by the owners of the goods was claimed by them from the underwriters. It was not stated, otherwise than by the recital, that the claim was fair and just according to the law and practice of the country. Lord ELLENBOROUGH, in giving judgment in favour of the underwriters, said he did not pronounce what might have been the effect of a statement in the case (if it had contained such), that it was a known and invariable usage amongst merchants at Lisbon, the port of discharge, to treat losses and expenses of the kind and description which were specified in the case, as the subjects of general average. But he observed that the case contained no allegation of fact on this head, but merely states a decree of a Court at Lisbon, which proceeds on the assumption of this supposed fact as its foundation. “And although,” he says, “by the comity which is paid by us to the judgment of other Courts abroad of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate, yet we feel that we should carry that principle of comity further than reasonably ought to be done, or ever hitherto has in practice been done, if we should draw from the recitals of facts and usages which are contained in those judgments, general evidence of the existence of such facts and usages, and allow them to be available for all causes and purposes, and consider them as applicable to, and obligatory upon, other persons than the immediate parties to those judgments, in which these recitals occur.”

In the case of *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481, 41 L. J. C. P. 170, 26 L. T. 797, 20 W. R. 777, the policy, on goods on voyage from Taganrog to Bremen, contained the marginal note “to pay general average as per foreign statement if so made.” The master had been obliged by stress of weather to put into several ports, and to charge the cargo for repairs, and the owners of the cargo, under an average statement made at Bremen, were obliged to pay expenses so incurred. It was held by all the Court (BOVILL, Ch. J., KEATING, J., and BRETT, J.) that by the special terms of the policy the owners of goods were bound by this statement. But BRETT, J., held that, as it was proved in the case that the expenses in question were general average according to

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Bremen law, the insurers would have been liable under an ordinary policy. "I incline to think," he says, "notwithstanding *Power v. Whitmore*, that underwriters, if they are not absolutely bound to accept the foreign adjustment as rightly made, if *bonâ fide* made, must assume it to be rightly made, if *bonâ fide* made, until the contrary be proved." In other words, he is of opinion, contrary to that of Lord ELLENBOROUGH, that the settlement of the average according to the statement or decree of the arbitrator or other authority at the foreign port is *prima facie* evidence of the law and usage there.

## AMERICAN NOTES.

This case is cited in 2 Parsons on Marine Insurance, pp. 360 *et seq.* But that writer "considers the rule well established" that adjustment may be made at any port where the contributory interests first separate. So held in *Loring v. Neptune Ins. Co.*, 20 Pickering (Mass.), 413. The doctrine of the rule is asserted in *Strong v. N. Y. F. Ins. Co.*, 11 Johnson (N. Y.), 323 (distinguishing *Lenox v. United Ins. Co.*, *infra*; *Depau v. Ocean Ins. Co.*, 5 Cowen (N. Y.), 63; 15 Am. Dec. 431; *Peters v. Warren Ins. Co.*, 1 Story (U. S. Circ. Ct.), 463; *Lewis v. Williams*, 1 Hall (N. Y. Super. Ct.), 430.

In *Loring v. Neptune Ins. Co.*, *supra*, SHAW, Ch. J., observed: "In general, it is to be presumed that both the assured and the underwriter are acquainted with the nature of the business in respect to which they contract, that they are acquainted with the customs and usages of that business, and consent to conform to them, unless there be some stipulation to the contrary. It is well known therefore to both parties that the assured may have to pay, in respect to losses insured against, general averages; that these averages may be adjusted abroad; and that the assured will be bound by such adjustment, although in making it conformably to the law and usages of the places where made, both the sum to be contributed and the contributory interests may be estimated upon principles varying from those which prevail at the place where the contract of insurance is made. It seems to follow as a necessary consequence, that where the assured has incurred a general average loss within the perils insured against, when such loss has been adjusted at the proper place, and in a mode conformable to the law and usage of such place, and when the assured has thus become bound to pay and has paid such loss, he is entitled to recover it of the underwriter, although the contributory interests have been estimated upon a principle different from that of the place where the policy was underwritten."

STORY, J., said, in *Peters v. Warren Ins. Co.*, *supra*: "Now certainly the weight of authority, both in England and America, is that the items included and the sums apportioned and paid according to the law of a foreign country, as a general average in an adjustment thereof made there, and *a fortiori*, if enforced by the public tribunals there, are, *quoad* the items and the rule of apportionment, conclusive upon and payable by the underwriters here as a general average although not apportioned in the same manner and not deemed items of general average by our law. . . . There is nothing unreasonable in

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construing the engagement of the underwriters in a policy to be that they will pay whatever the insured in a policy is compelled to pay as a general average, arising from the risks insured against."

In *Lenox v. United Ins. Co.*, 3 Johnson Cases (N. Y.), 178, and *Shiff v. Louis. State Ins. Co.*, 6 Martin (Louisiana, N. S.), 629, it was held that the parties were not bound by an adjustment at a foreign port, because they must be presumed to have contracted with reference to the law of their own country. So in *Thornton v. U. S. Ins. Co.*, 3 Fairfield (Maine), 153. But the *Lenox* case is considered in *Lewis v. Williams*, 1 Hall (N. Y. Super. Ct.), 430, to have been overruled by subsequent decisions. (*Strong v. N. Y. F. Ins. Co.*, 11 Johnson, 323, holding that "a settlement of the general average at the foreign port, when fairly made according to the laws of the country to which the port belongs, is binding upon the parties, and that it is the duty of the master to cause an adjustment to be made on his arrival at the port of destination, and to enforce the payment of the contribution, and that he has a lien upon the cargo for its proportion.")

No. 87.—DICKENSON *v.* JARDINE.

(c. p. 1868.)

## RULE.

IN case of a general average loss, the insurer is directly liable for the whole of the insured value of the property sacrificed for the general benefit; and upon payment is subrogated to the rights of the insured for contribution.

Dickenson and others *v.* Jardine and others.

L. R. 3 C. P. 639-644 (s. c. 37 L. J. C. P. 321; 18 L. T. 717; 16 W. R. 1169).

*Insurance.—Jettison.—General Average.—Liability of Underwriters.* [639]  
*Custom.*

A. insured goods at Canton by a policy which included jettison among the perils insured against. The goods were jettisoned under circumstances which entitled A. to a general average contribution from the owners of the ship and of the rest of the cargo, which arrived safely at London, the port of discharge. A. having sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo:—

*Held*, that he was entitled to recover; and that the underwriters having paid him would be then entitled to stand in his place with respect to the general average contribution.

*Held*, also, that the liability of the underwriters under the policy could not be varied by a custom, alleged to exist in the port of London between mer-

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chants and underwriters, to hold the latter liable only for the share of the loss cast upon the owner of jettisoned goods in the general average statement.

Special case stated for the opinion of the Court, without pleadings.

In August, 1864, the plaintiffs shipped 641 packages of tea on board the ship *Canute*, to be carried from Foochow to London. The goods were insured with the defendants for £3987 10s. by a valued voyage policy in the usual form, the goods being valued at the sum insured, and jettisons being included among the perils insured against.

The *Canute* sailed from Foochow with the tea and other goods on board, and in the course of her voyage she struck on a reef. A portion of the cargo, consisting of 607 out of the 641 above-mentioned packages of tea, was properly thrown overboard to lighten her. Subsequently she got off the reef, and reached London safely with the rest of the cargo. The insurable value of these 607 packages was £3776 6s. The net value of the jettisoned tea, had it arrived safely at its destination, would have been £3305 0s. 2d., being a sum less than the insured value.

The loss of the tea so jettisoned constituted a general average loss, giving to the plaintiffs a right to contribution from the various owners of the other interests at risk in the usual way to the amount of the above sum, £3305 0s. 2d., of which the plaintiffs

themselves had to contribute the sum of £995 12s. 2d., being their proportion \* of the whole general average by the vessel. The defendants paid to the plaintiffs the sum of £995 12s. 2d., and the plaintiffs brought this action to recover £2780 13s. 10d., the difference between that sum and the sum for which the goods jettisoned were insured. There are certain cases in which goods are thrown overboard, but not for the safety of the whole adventure; and in such cases, although they do not give rise to general average contribution, the goods, nevertheless, are said to be jettisoned.

It was contended, on behalf of the defendants, that it was an established custom between merchants and underwriters in the business of marine insurance in London, that under a policy of insurance covering loss by jettison, in case the insured goods were lost by jettison under such circumstances as to constitute a general average loss as between the owners of such goods and the owners

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of the other interests at risk, the underwriters were liable under the policy only in respect of such share or proportion of the loss as was cast upon the owner of the jettisoned goods in the general average statement.

The evidence adduced in support of this contention was given at length in the case.

The questions for the Court were: 1st. Whether the plaintiffs were entitled to recover in the action the whole of the insurable value of the cargo jettisoned? 2ndly. If the Court should be of opinion in the negative, then whether the plaintiffs were entitled to recover anything more than their general average proportion calculated upon the net arrived value of the goods?

Sir G. Honyman, Q. C., for the plaintiffs.—The plaintiffs are entitled to recover the full value of the goods which they insured, independently of the question of any rights they may have against third parties; the defendants, when they have paid, will stand in the plaintiffs' place in respect of such rights. If the plaintiffs had issued their writ the day after the loss of the goods, the defendants would have had no defence, as the rights of general average contribution do not arise till the ship arrives at her port of destination, and the liability of the defendants can hardly have ceased from the mere fact of a right of action against third parties having subsequently arisen. The custom relied on by the defendants was \*not proved, and if it had been so, it would have [\* 641] been inadmissible as contradicting the policy, and would have been invalid on the ground of unreasonableness, and would have had no application to this policy, which was made at Canton, while the custom is confined to the port of London.

Watkin Williams, for the defendants.—The principal question is, whether the defendants are bound to pay the plaintiffs at once the whole value of the goods insured, or only to indemnify them for what they contribute by way of general average, leaving them to recover the remainder of the loss from the other parties who are liable to contribute by way of general average. In a word, the question is, whether the loss is a total loss, or a loss of a different kind? whether, if a bale of goods worth £1000 be thrown overboard, under circumstances which entitle the owner to be repaid £900, it is a total loss?

[WILLES, J.—The right to be repaid in part only arises if the ship or cargo arrives safely.]

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If they do not, but are themselves lost, the loss of the goods jettisoned becomes total, but not before. As a matter of common sense, would a merchant write off the value of the bale as totally lost?

[WILLES, J.—If a pirate had boarded the vessel, and thrown the goods overboard, the plaintiffs would have had a right of action against him for the value; or if the master had thrown them overboard wrongfully, the plaintiff's could have sued the shipowner; but would the loss in either case not have been total?]

It cannot be denied that it would. There are, however, some authorities for the view that the loss is not total in such a case as the present. The principal one is Roccus on Insurance, n. 62, who, though he does not state the amount for which the underwriters would be liable, whether to make good the value insured, or only the value upon which the general average would be calculated, yet certainly does not treat the loss as a total loss. In Marshall on Insurance, 4th ed., p. 434, it is said that the assured should proceed first against the parties who are liable to contribute by way of general average, and only sue the underwriters for the residue. There is a case in the American reports, *Lapsley v. Pleasants*, 4 Binn. 502, in which the same rule was laid down, though there are also cases to the contrary.

[\* 642] \* [BOVILL, Ch. J.—That case is referred to in Phillips on Insurance, vol. ii. p. 122, and the author adds a note citing Emergion, c. 12, s. 44, Pothier on Insurance, c. 52, that the claim may be first made against the underwriters.]

The amount recovered under the average loss is sometimes greater and sometimes less than the insurable value. In the former case, would not the assured be entitled to recover the larger amount?

[WILLES, J.—He would, but it would be upon a different claim, viz. for indemnification for his loss from having to pay the general average contribution, which is quite distinct from the claim for indemnification for the loss of the goods themselves, and arises only on the ship or other goods reaching the port of destination safely.]

BOVILL, Ch. J.—I am of opinion that the plaintiffs are entitled to recover the whole of the amount claimed by them.

I think the rule is correctly stated in Phillips on Insurance, 3rd ed., vol. ii. s. 1348, as follows: "It is not a condition that the assured on goods must claim contribution of the other parties for

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a jettison before he can demand indemnity from his underwriters. He may demand it of them in the first instance." There seems to have been a decision in the Courts of Pennsylvania, *Lapsley v. Pleasants*, 4 Binn. 502, to the contrary effect; but there had been an earlier decision in the Court of New York, *Maggrath v. Church*, 1 Caines, 196, in which the underwriters had been held liable for the whole amount insured; and in a later case in the Circuit Court of the United States, *Potter v. Providence Washington Insurance Company*, 4 Mason, 298, STORY, J., delivering the judgment of the Court, after citing both cases, followed the earlier decision, and laid down the law in the same way as Mr. Phillips has done. Pothier's *Traité du Contrat d'Assurance*, s. 52, is to the like effect. In this case the goods were insured against jettison, amongst other risks, and the goods were jettisoned, and I think the plaintiffs are entitled, therefore, to recover the sum insured. It is true that there is a remedy against the owners of the ship and the remainder of the cargo, if they ultimately arrive safely at their destination, for part of the loss. But this does not affect the plaintiffs' right against the underwriters, who will then be entitled \* to stand in their place, and recover contributions [\* 643] from the other parties who are liable. A further question has been raised, whether the underwriters are not released by a custom alleged to exist at the port of London; but this custom was not made out, and if it had been so, would not have availed the defendants, being unreasonable and contrary to the express agreement of the parties, as was the custom set up in the case of *Grissell v. Bristowe*, L. R. 3 C. P. 112.

WILLES, J.—I am of the same opinion. Mr. Williams argued the case in the only way which was possible when he said that a case of jettison under the circumstances here detailed did not constitute a total loss of the goods, because in point of law the loss was less than total, by the value of the right which accrued to have compensation for part of the loss from the shipowner and the other owners of cargo. It was so in one sense, because if the vessel or any part of the cargo arrived safely in consequence of the jettison, the owners must contribute to the loss sustained by the owners of the goods so sacrificed for the general advantage; but the goods were totally lost at the time, though their owner had a contingent right to recover from certain persons a portion of their value. The result is that the owner has two remedies,—one for

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the whole value of the goods against the underwriters, the other for a contribution in case the vessel arrives safely in port; and he may avail himself of which he pleases, though he cannot retain the proceeds of both, so as to be repaid the value of his loss twice over. This is the usual case where there is an insurance, and a loss following therefrom, within its terms, which would be total but for the liability of a third person. It has been so settled since the case of *Randal v. Cockran*, 1 Ves. Sen. 98; in that case a vessel had been taken by the Spaniards, and the underwriters had paid as for a total loss. Reprisals having been made, the commissioners who were appointed to indemnify those who had sustained losses refused to entertain a claim made by the underwriters; but the assured having obtained from them a contribution over again towards their loss, the underwriters filed a bill, and it was held, not that the loss was not total, but that the underwriters having indemnified the assured, whatever the assured received from

[\* 644] the \* commissioners must be held by them as trustees for the underwriters. If the assured proceeds against the underwriters in the first instance, the latter cannot avail themselves by way of plea of the fact that the assured has a distinct right against some other person. They must pay the amount claimed in the first instance, and will then be entitled to use the name of the assured, and proceed against the other parties who are liable, as explained by Lord WENSLEYDALE in *Quebec Fire Insurance Company v. St. Louis*, 7 Moo. P. C. 236, 316. Questions of this kind have arisen in many forms, and always have been decided the same way; thus, in *Yates v. Whyte*, 4 Bing. N. C. 272, the defendant, who was liable for a loss that had been paid by the underwriters, insisted that the underwriters having already indemnified the plaintiff the claim against him was satisfied, but the plaintiff was held entitled to recover for the benefit of the underwriters. With respect to the alleged custom, it was not proved, the evidence at most showing only a practice adopted in undisputed cases; and, moreover, the loss being one springing directly from the contract of insurance, could not be affected by such a usage if proved.

MONTAGUE SMITH, J.—I am of the same opinion. I think the goods jettisoned were totally lost to the assured within the terms of the policy, and that the underwriters are therefore liable to pay for the value of the goods. It is said that the loss is not total, because there are other parties who are bound to contribute to the

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loss, and the plaintiffs are therefore already partially indemnified. That in one sense is so, but the assured have made a contract with the underwriters that they shall be paid the sum insured in certain events which have happened, and they are entitled to look to that contract for their indemnification independently of their other rights. Both upon principles of law and the weight of authority, we have a right to treat this as a total loss.

*Judgment for the plaintiffs.*

## AMERICAN NOTES.

This doctrine is approved in 2 Parsons on Marine Insurance, p. 289 *et seq.*: “The insured may claim of the insurers the whole amount of his loss, transferring to them his claim for contribution.” Sustained by *Maggrath v. Church*, 1 Caines (N. Y.), 196; 2 Am. Dec. 173; *Faulkner v. Augusta Ins. Co.*, 2 McMullan Law (So. Car.), 158; 39 Am. Dec. 119; *Watson v. Mar. Ins. Co.*, 7 Johnson (N. Y.), 57; *Amory v. Jones*, 6 Massachusetts, 318; *Forbes v. Manuf. Ins. Co.*, 1 Gray (Mass.), 371; *Lord v. Neptune Ins. Co.*, 10 ibid. 109; *Potter v. Prov. W. Ins. Co.*, 4 Mason (U. S. Circ. Ct.), 298; *Greely v. Tremont Ins. Co.*, 9 Cushing (Mass.), 415; *Hanse v. N. O. M. & F. Ins. Co.*, 10 Louisiana, 1; 29 Am. Dec. 456; which cases hold that the insured may recover the whole loss from the insurer in the first instance, without first demanding contribution from the other shippers, leaving the insurer to enforce the claim for contribution. (The contrary however is asserted in Pennsylvania: *Lapsley v. U. S. Ins. Co.*, 4 Binney, 502.) SHAW, Ch. J., says in the *Greely* case cited above: “The underwriter is liable directly to the assured for a loss, in its nature a general average loss: that is, resulting from a voluntary sacrifice or its necessary incidental consequences, without waiting to collect contributory shares from other persons, unless indeed the same person be owner of both vessel and cargo.” KENT, Ch. J., said in the *Watson* case above cited: The plaintiff “is entitled, even if a case for contribution existed, to recover the whole of it, in the first instance, of the insurer upon the ship, and to leave it to him to call upon the owners or insurers of the cargo and freight for their contributory shares.” (Citing the *Maggrath* case, *supra*, and *Vandenheurel v. United Ins. Co.*, 1 Johnson (N. Y.), 412.) “A settled rule,” and “Pothier recognizes it as an established doctrine.”

In the Pennsylvania case (which was one of jettison) the Court said: “It seems reasonable that he who is entitled to receive the contribution should in the first instance apply for it. . . . If indemnification for their loss is their object, what is the difference whether they receive it from the defendants or other persons? I can find no satisfactory answer to this question but by supposing that bare indemnification will not satisfy the plaintiffs. Their object must be to make gain by abandoning to the defendants, and thus producing a constructive loss,” &c. The Court distinguish the *Amory* case and disapprove the *Maggrath* case, and conclude: “There should be a demand made from the persons bound to contribute, and some reasonable endeavor to procure payment, and the insured has not a right in the first instance to make

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an election whereby a loss partial in its nature is by construction rendered total." (Two Judges dissented.)

The Massachusetts, New York, and Pennsylvania cases are considered in the South Carolina case cited above, and the doctrine of the two former preferred. The Court observe: "The Court does not perceive how the insured can be suspended in their right of action by the mere qualified obligation first to demand contribution of the other shippers. This is often done from self-interest or justice to the insurers. But in many instances the obligation to do so might be inconvenient — perplex with suits and impede the very object aimed at by the policy of insurance — immediate reimbursement of the insured in the value of the goods lost, in order that the voyage might not be retarded, or its fruits lost, which would be contrary to the general end of insurance, — to extend commerce and advance its success. And these are to be answered by the immediate reimbursement promised by the insurers. I would therefore think that the adjustment of average loss among the different shippers, and the average bond, are to be considered as a counter-indemnity to the insurers after paying the whole loss."

This doctrine is applied in the case of a loss occasioned by a wrong-doer. *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio State, 382; 10 Am. Rep. 746. As by collision: 1 Parsons on Marine Insurance, p. 551; *The Planter*, 2 Woods (U. S. Cir. Ct.), 490; and the insurer is subrogated to the rights of an insured mortgagee: Parsons on Marine Insurance, 228; and so as to a claim against a carrier for negligence: *Insurance Co. v. The C. D., Jr.*, 1 Woods (U. S. Cir. Ct.), 72; *Sun M. Ins. Co. v. Miss. Valley T. Co.*, 17 Federal Reporter, 919.

## SECTION XI.—*Adjustment of Losses.*

### No. 88.—USHER v. NOBLE.

(K. B. 1810.)

#### RULE.

To estimate the loss upon an open policy on goods, the rule is to take as the basis of calculation (prime cost usually represented by) the invoice price at the loading port, together with the premium of insurance (expenses of loading) and commission. But where part of the goods are only damaged, the loss is calculated in the first instance by taking the difference between the selling price of the sound and damaged goods at the port of delivery, and then applying this difference proportionally to the standard basis calculated as above mentioned.

## No. 88.—Usher v. Noble, 12 East, 639, 640.

**Usher v. Noble.**

12 East, 639-648 (11 R. R. 505).

*Insurance.—Open Policy.—Adjustment.*

The rule for estimating any loss of goods insured by an open policy [639] is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound and that of the damaged part of the goods at the port of delivery, and applying that proportion (be it a half, a quarter, an eighth, &c.), with reference to such estimated value at the loading port, to the damaged portion of the goods.

This was an action upon a policy of insurance subscribed by the defendant for £200 on goods on board the *General Miranda*, at and from Jamaica to London. In the declaration the loss was thus averred: that the ship, having the goods on board, was in the river Thames, and before the discharge of the goods at London, by the mere danger of the seas, and force and violence of the tide and winds, and the pressure of other ships, stranded and sunk, and the goods thereby totally lost. The declaration also contained the money counts. The defendant pleaded *non assumpsit*, and paid £14 into Court generally upon the whole declaration. And at the trial before Lord ELLENBOROUGH, Ch. J., at Guildhall, a verdict was found for the plaintiff for the damages laid in the declaration, subject to the opinion of the Court upon this case. (It being agreed that the amount of the damage should be settled by arbitration, if the Court should be of opinion that the plaintiff was entitled to recover anything beyond the sum paid into Court.)

On the 4th October, 1807, the ship *General Miranda* arrived from Jamaica with the plaintiff's goods insured on board in the river Thames, and anchored near the entrance into the West India docks. Shortly afterwards, and as soon as the necessary forms were complied with, the vessel left her anchorage in the river for the purpose of entering these docks, in order to unload her cargo there; but on her near approach, and when about to go through the dock gates, she was wrongfully refused admittance, and ordered back by the servants of the company, under whose direction \* and management these docks were placed. Upon this she returned back

[\* 640]

## No. 88.—Usher v. Noble, 12 East, 640, 641.

to the river, and endeavoured to regain a place of safety there; but this was found impracticable; and the best thing that could be done was to moor her to a chain near the entrance to the docks, at which several other vessels that had returned from such entrance had previously moored. This was accordingly done, and the *General Miranda*, being the vessel nearest the shore, was at the falling of the tide forced by the violence of the current and pressure of the other ships upon a shoal or bank of the river, and was there bilged and stranded; and, in consequence, a part of the plaintiff's goods, consisting of coffee, was greatly damaged. In consequence of this the plaintiff brought an action against the West India dock company, and recovered a verdict against them for the amount of the loss, estimated according to the market price of coffee in London at the time when the loss took place, but which was less than the prime cost of the coffee at Jamaica. The defendant obtained a Judge's order for liberty to inspect and take copies of the statement of the loss, and the following was delivered as such copy:—

Statement of average per *General Miranda*, Orr. —  
Jamaica to London.

Amount of goods per invoice No. 1 & 2, and bills of lading	£	s.	d.
No. 3 & 4 . . . . .	6326	0	1
Insuring £7600 to cover, as under,			
£6750 at 15 gs. per cent . . . . .	1063	2	6
850 12 . . . . .	107	2	0
7600 Policy . . . . .	19	0	0
Commission $\frac{1}{2}$ per cent for effecting	38	0	0
[*641] * Commission $\frac{1}{2}$ per cent for settling in case of loss . . . . .	38	0	0
	1265	4	6
	7591	4	7

Deduct

Amount of sound coffee and wood per invoice			
No. 5 and landing account No. 6 & 7 . .	2570	3	2
Insurance on £3085 to cover, as under,			
£2740 at 15 gs. per cent . . . . .	413	11	0
345 . . . . .	43	9	4
Policy for £3085 . . . . .	7	14	3
Carried over . . . . .	464	14	7

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	£	s.	d.	£	s.	d.	£	s.	d.
Brought over . . . . .	464	14	7	2570	3	2	7591	4	7
Commission $\frac{1}{2}$ per cent for effecting . . . . .	15	8	6						
Ditto $\frac{1}{2}$ per cent for recovery in case of loss . . . . .	15	8	6	513	11	7	3083	14	9
Add							4507	9	10
General Average per Mr. Parkinson, award No. 8 . . . . .							189	4	5
							4696	14	3
Deduct									
Proceeds of damaged coffee per A. sale, No. 9 . . . . .	174	12	9						
* Recovered from West India dock company per statement, <sup>1</sup> No. 10 . . . . .	2741	15	8						
From which deduct									
Extra law expences . . . . .	98	18	8	2642	17	0	2817	9	9
If £7600 : 1879 :: £100							1879	4	6

Answer, £24 : 14 : 6½ per cent, exclusive of return of premium for sailing in company with armed ship.

The only question at the trial was, by what measure the damage was to be estimated between the assured and the underwriters. The plaintiff contended that he was entitled to such proportion of the prime cost as would correspond with the proportion of the diminution of the market price occasioned by injury which the coffee had sustained, according to the rule laid down in *Lewis v.*

<sup>1</sup> The West India Dock Company,

To amount of loss on 748 2 10 damaged coffee, per <i>General Miranda</i> , averaged per account sales of sound coffee, per said vessel, 420 3 12 of sound coffee having netted £1569 13s. 1d. . . . .	£2727	4	0
Amount of general average . . . . .	189	4	5
	2916	8	5

Deduct

Proceeds of damaged coffee . . . . .	174	12	9
	2741	15	8

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*Rucker*, 2 Burr. 1169 (p. 215, *ante*). If this measure should be adopted, the sum paid into Court was insufficient. The defendant contended that the case of *Lewis v. Rucker* did not apply [\* 643] \* to this case; and that the plaintiff was only entitled to the difference between the actual value of the damaged and sound coffee at the market price in London, when the ship arrived; and according to which rule he had received a compensation from the West India dock company, who had been the cause of the loss. If the plaintiff were entitled to recover according to the prime cost, it was admitted that the £7 per cent paid into Court was not enough to cover the whole extent of the defendant's liability, the ulterior amount of which was agreed to be settled by arbitration. If the plaintiff were entitled to recover only according to the actual value of the coffee in London when the loss took place, the sum paid into Court was sufficient to cover the defendant's liability. The question, therefore, was, whether the plaintiff were entitled to recover anything beyond the sum paid into Court? If he were, the present verdict was to stand, and the amount to be settled by arbitration: if not, a nonsuit was to be entered.

This case was argued in the last term, when the rule of calculation insisted on by the plaintiff was maintained by Abbott, principally upon the authority of *Lewis v. Rucker*; though that was the case of a valued, and this is the case of an open policy; but the rule,<sup>1</sup> he contended, applied in reason equally to both. And he also referred to 2 Val. 115, and 2 Emerigon, 659, as adopting the same rule of calculation.

[\* 644] \* Carr, on the contrary, admitting the rule in *Lewis v. Rucker* as applied to valued policies, denied its application to an open policy, such as this is; upon the ground that a policy of insurance being a mere contract of indemnity, the loss which the party sustains by the goods not arriving at the port of delivery is that which they would have netted to him if they had arrived at their port of delivery: And reckoning the sum paid by the West India dock company with that which has been paid into Court by the defendant, the whole of the plaintiff's actual loss, in

<sup>1</sup> The rule there laid down was, that the insurer should pay to the insured for the damaged goods the like proportion of the sum at which the goods were valued

in the policy, as the price of the damaged goods bore to the price of the sound goods of the same kind when landed at the port of delivery.

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consequence of the perils insured against, would, he contended, be compensated. He put the case thus: Suppose the invoice price of the goods, with all charges thereon, to be £100 at the loading port; but coming to a falling market at the port of delivery, they are only worth, if sound, £80; but being damaged, they are only worth there £40. If the peril had not happened, the assured would have gotten only £80: the compensation then to be paid by the underwriter should be £40, whereas the plaintiff seeks to get considerably more. The adoption of such a rule of compensation will hold out a temptation to an assured to procure a partial loss whenever the goods are proceeding to a falling market. But as Lord MANSFIELD said, in *Hamilton v. Mendez*, 2 Burr. 1214 (1 R. C. 119), an insurer ought never to pay less upon a contract of indemnity than the value of the loss, and the insured ought never to gain more. [LE BLANC, J. — Must not the invoice price be taken as the basis of the calculation in the case of a total loss? And if so, why not in the case of a partial loss?] In the case of a total loss, that basis must be taken *ex necessitate*, because it cannot appear what the value of the goods would have been if they had arrived at the port of delivery; but a partial

\* loss is more analogous to the case of general average; and [\* 645] it would be strange that the wrong-doers, by whose fault the loss was occasioned, should pay only according to the actual value at the port of delivery, and that the underwriters on a contract of indemnity should pay more. [Lord ELLENBOROUGH, Ch. J. According to the rule contended for by the underwriter in this case, he would have had to pay more than the invoice price if the goods had come, as they usually do, to a rising market. The basis of the valuation must be taken either at the port of lading or at the port of delivery. It is in some respects an artificial rule at whichever place it is taken, and not strictly one of indemnity.] The Consolato del Mare, the oldest modern code of maritime law, says, that the amount of the loss is to be taken at the price of the goods at the port of delivery, if the voyage were half performed at the time. [Lord ELLENBOROUGH, Ch. J. — That was a rule *positivi juris*; I do not mean to say an unjust one. His Lordship observed, that it did not appear that *Johnson v. Sheldon*, 2 East, 581 (6 R. R. 516), was the case of a valued policy.]

Abbott, in reply, relied on the general and more certain convenience of the rule laid down in *Lewis v. Rucker*. And he also

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referred to *Dick v. Allen*, at Guildhall, after Mich. T. 1785,<sup>1</sup> where, in an action upon a policy of insurance to recover an average loss upon goods, BULLER, J., observed, that whether the goods arrived at a good or bad market was immaterial; for the true way of estimating the loss was to take them at the fair invoice price.

[\* 646] \* Lord ELLENBOROUGH, Ch. J.—As the Court will have to promulgate a rule, which will bind in future in similar cases, it will perhaps be more willingly acquiesced in, if delivered upon more mature deliberation: we will therefore take further time before we give our opinion. The question will be, whether every case be not in effect the case of a valued policy so far as it involves this consideration, and consequently within the rule laid down in *Lewis v. Rucker*. Where the parties have put an express valuation on the subject-matter of the insurance, that rule is admitted to govern; and the question is, whether general usage has not established the invoice price as the basis of the value in all other cases where the policy is open. Some rule there must be, and I rather think that the one laid down in *Lewis v. Rucker* was adopted as being, upon the whole, the most convenient in all cases.

The case stood over for further consideration till this term, when his Lordship delivered the opinion of the Court.

It is admitted that the assured is entitled to an indemnity, and no more; but by what standard of value the indemnity sought should be regulated, is the question. In the case of a valued policy, the valuation in the policy is the agreed standard; in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market price at the port of delivery cannot be alone the standard; as that does not include premiums of insurance and commission, which must be brought into the account, in [\* 647] order to constitute an indemnity to an \*owner of goods who had increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing

<sup>1</sup> Park, 139, 6th edition. Mr. Park now observed that that was the case of an open policy. And see *Tuite v. The Royal Exchange Assurance Company*, at Guildhall, after Trin. Term, 1747, before Lord Ch. J. LEE.

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the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case; *i.e.*, it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be compensated. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, *i.e.*, to the invoice price, being itself calculated as before stated; and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money. This rule of calculation is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions I have mentioned, as the standard of value for this purpose. In this case, after receiving the money paid by the West India dock company, the assured is left short of his full reimbursement (even on the defendant's own calculation) by the premiums of insurance at 15 guineas per cent commission, and extra costs of suit, for which no allowance was made by the West India dock company: so \* that *quacunque viâ datâ*, the £7 per [ \* 648] cent paid into Court is too little. The consequence is that the verdict must stand, subject to the reference of account to an arbitrator, as agreed by the case.

## ENGLISH NOTES.

See also *Johnson v. Sheldon* (1802), 2 East, 581, 6 R. R. 516, which shows that the gross proceeds, and not the net proceeds, at the port of delivery, is the basis on which the comparison proceeds, in case the goods arrive in a damaged condition. If expenses have been incurred in putting the goods into a merchantable condition, these are not taken into consideration in adjusting the loss, though they may be recovered under the suing and labouring clause. *Francis v. Boulton* (1895), 65 L. J. Q. B. 153, 73 L. T. 578, 44 W. R. 222.

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Where various articles are insured together in the same policy and there is an average loss on each, the only fair rule is to adjust the loss separately on each article. Arnould on Insurance, 6th ed., p. 934, citing Benecke Pr. of Indem. and Stevens on Average.

How the rule is applied to a floating policy appears in *Crowley v. Cohen*, 13 R. C. 314. An insurance which at first sight was very similar to a floating policy, but was distinguished as a different kind of insurance altogether, came into question in *Joyce v. Kennard* (1871), L. R. 7 Q. B. 78, 41 L. J. Q. B. 17, 25 L. T. 932, 20 W. R. 233. It was an insurance on all goods on all wharves and lighters of the plaintiffs, who were lighterinen, against all losses for which they should be responsible; that is to say, against risks quite different from those which form the subject of an ordinary marine insurance policy. The Court construed this as a contract of indemnity limited only by the amount of the subscription, and having no relation to the total value of the property which might at any time be within the scope of the insurance.

#### AMERICAN NOTES.

"This doctrine is fully adopted in the United States :" 1 Parsons on Marine Insurance, p. 243. Sustained by *Le Roy v. U. S. Ins. Co.*, 7 Johnson (N. Y.), 343; *Post v. Phoenix Ins. Co.*, 10 ibid. 79; *Clark v. United F. & M. Ins. Co.*, 7 Massachusetts, 365; 5 Am. Dec. 50; *Carson v. Marine Ins. Co.*, 2 Washington (U. S. Circ. Ct.), 468; *Snell v. Delaware Ins. Co.*, 1 ibid. 509; *Coffin v. Newburyport M. Ins. Co.*, 9 Massachusetts, 436; *Fontaine v. Columbian Ins. Co.*, 9 Johnson (N. Y.), 29; *Suydam v. Marine Ins. Co.*, 2 ibid. 138.

In the *Coffin* case, *supra*, the Court observed : "A policy of insurance is a contract of indemnity. To render it such, as respects goods, the rule is, when they are purchased, to make an aggregate of their prime or invoice price, and all duties and expenses upon them, until they are put on board, including the premium of insurance; and from analogy, if the goods happen not to be purchased, but are grown or produced, or the property in them otherwise obtained by the assured, then their value, or what is the same thing, their price, at the place where the insurance commences." In the *Clark* case, *supra*, the Court said : "The insurance upon the goods is restricted to their value at the port of lading, or their prime cost, including all expenses upon them until laden on board." (And expected profits were disallowed.) So in *Smith v. Condry*, 1 Howard (U. S. Supr. Ct.), 35.

In the *Carson* case, *supra*, the Court said : "It being admitted that there is no direct authority or custom in relation to a case precisely like the present, it must be decided upon an attentive consideration of the nature of the contract of insurance." This, the Court said, is a contract of indemnity, and continued : "But it is impossible that the first cost can ever furnish a just rule of indemnity, where it exceeds or falls short of the actual value of the property when it is put at risk. The invoice price, which was contended for on behalf of the

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plaintiffs, is liable to all the objections which exist against the prime cost,—and to an additional one, which, in the opinion of the Court, cannot be surmounted. It furnishes no rule of indemnity, in any case where it exceeds, or is less than, the market value of the article; if the former, the insured is more than indemnified by receiving more than it was worth; if the latter, which it is presumed will seldom, if ever, happen, his indemnity would be in part only. But the strong ground of objection to this rule for appreciating the value of the property at risk, is, that it substantially destroys all distinction between valued and open policies, and this too in the face of one of the best established rules of evidence. It makes a private document, created by one party to the contract, evidence against the other, as to a fact which it is essential for the former to prove in the ordinary way. In the case of a valued policy, the insured is relieved from the necessity of proving the amount of his loss, because *both parties have agreed* that the property at risk was worth so much. But to bind the insurer by the arbitrary value fixed in the invoice is to subject him to *ex parte* evidence, furnished by his opponent in the cause, without his agreement, and even without his knowledge of its contents when the contract was entered into. And as it rarely happens, if ever, that an invoice does not accompany the cargo, it would follow that all policies would in fact be valued; with this difference only, that what has hitherto been understood as valued policies means nothing more than such as are valued by both parties, whereas open policies would be valued by one of the parties only.

“If neither the prime cost nor the invoice price can furnish a correct rule for estimating the value of the plaintiffs’ indemnity, will both together answer the purpose? If they differ, neither can be admitted, if the preceding course of reasoning be right. If they agree, then the contention for a choice is merely a dispute about terms. But if either or both vary from the real value of the property insured, and consequently furnish no just rule of indemnity, then it is impossible that their agreement can furnish any.” And the Court concluded that the recovery must be based upon “the market price of the property insured at the time and place of exportation.”

In *Mut. Safety Ins. Co. v. Cargo of Brig George*, 1 Olcott (U. S. Dist. Ct.), 102, it was held, in a case of general average, that “the invoices and bills of lading will be received as evidence of the value of the cargo at the place of purchase and shipment,” but not conclusive.

Kent says: “The actual or market value at the port of departure may frequently be different from the invoice price, or prime cost, and when that happens, or can be ascertained, it is to be preferred.” (Citing *Snell v. Del. Ins. Co.*, 4 Dallas (U. S. Circ. Ct.), 430, and the *Carson* case, *supra*.) “In *Gahn v. Broome*, 1 Johnson Cases (N. Y.), 120, the invoice price was adopted as the most stable and certain evidence of the actual value, but in *Le Roy v. United States Insurance Company* (7 Johns. Rep. 313), the invoice price was understood to be equivalent to the prime cost, and that was commonly the market value of the subject at the commencement of the risk. The Court, in that case, did not profess to lay down any general rule, but they nevertheless adopted the prime cost as being the plain and simple, and, generally speaking, the best,

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rule by which to test the value of the subject. The English Court of King's Bench, in *Usher v. Noble*, pursued in effect the same rule by estimating a loss on goods in an open policy, at the invoice price at the loading port, and taking with that the premium of insurance, and commission, as the basis of the calculation."

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(H. L. 1879.)

(APPEAL FROM LOHRE *v.* AITCHISON.)No. 90.—PITMAN *v.* UNIVERSAL MARINE INSURANCE COMPANY.

(C. A. 1882.)

## RULE.

In case of an insurance on ship, if the owners elect to repair, the measure of indemnity is (ordinarily and in the case of an old ship) the cost of repair, less one-third by reason of the repair giving new for old; and if the loss has to be estimated while the ship remains unrepairs, the indemnity is (*prima facie*) to be measured by an estimate on the same principle. But if the owners have elected to sell and have sold the ship unrepairs, they cannot by claiming an average loss recover more than the loss as fixed by the net price for which she was actually sold.

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4 App. Cas. 755-769 (s. c. 49 L. J. Q. B. 123; 41 L. T. 323; 28 W. R. 1).

[755] *Insurance.—Indemnity.—Partial Loss.—Value of Ship.—Suing and Labouring Clause.*

General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of marine assurance.

Salvage expenses are not assessed upon the *quantum meruit* principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid.

The assured, who had not abandoned, but had elected to repair, after damage

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sustained from perils of the sea, was *held*, therefore, not entitled to recover under that clause the expenses of salvage.

But *held* that, up to the amount insured, he was entitled to recover the cost of repair, with the reduction of one-third new for old, even although the amount, calculated upon that principle, should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured.

The ship *Crimea* was insured with the defendant for £1200, being valued in the policy at £2600. It encountered very bad weather, and was in danger of sinking; it was rescued by a steamer, which obtained from the Irish Court of Admiralty £800 as salvage money. The owner did not abandon, but elected to repair. The defendant's proportion of the repair expenses amounted (after the deduction of one-third new for old) to £1200, the full sum he had insured, and he was held liable to that amount; but was held not to be liable to any part of the salvage expenses.

Appeal against a decision of the Court of Appeal, which had partly sustained and partly varied a previous decision of the Queen's Bench Division.

A policy of insurance for £1200 had been effected on a vessel called the *Crimea*, for a voyage from the Clyde to Quebec or St. John's, and thence to the United Kingdom. The policy was in the usual form, and contained the usual suing and labouring clause. The defendant paid into Court the sum of £1080. The plaintiff replied, denying the sufficiency of the sum thus paid in. A \*special case was stated for the opinion of [\*756] the Court, which was to be at liberty to draw inferences of fact. (See 1 Q. B. D. 502, 3 Q. B. D. 553, where the circumstances are fully detailed.)

The policy was for £1200. The ship was, in the policy, valued at £2600. The real value was stated to be £3000. The outward voyage was performed in safety. On the homeward voyage the ship encountered such severe storms that it was in danger of being lost, when it was saved and carried into Kingston Harbour by the steamer *Texas*, to which the Irish Court of Admiralty afterwards awarded £800 for salvage.

The ship was nearly sixteen years old, and its value as it lay damaged in the docks after the storms was stated to be £998. The owner did not give notice of abandonment, but signed a contract for repairs for a sum of £2982. The repairs were executed at that sum. The amount of salvage and general average expenses borne by the ship was stated to have been £519. The ship had

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not before been metalled, but it was metalled in the docks at a cost of £695. That was not sought to be made a charge against the underwriter. The whole sum expended on the ship was stated in the case to have been £4414. This was subject to the ordinary deduction of one-third new for old. The value of the ship after all the repairs had been effected was estimated at £7000. Putting together the charges which the plaintiff contended he was entitled to claim against the underwriter, they amounted to £1707. The claim was resisted on the ground that there had only been a partial and not a total loss, actual or constructive, and that the underwriter could not be made liable, on a partial loss, to a greater amount than in the case of a total loss, in which he would have the benefit of salvage. The Queen's Bench Division had decided that the cost of repair, making the usual deduction of one-third new for old, was the measure of the loss if the shipowner elected to repair; and, consequently, that the assured was entitled to recover such cost of repair up to the amount insured for, even though the loss so estimated might amount to more than a total loss with benefit of salvage. But the assured was held not entitled

to recover any portion of the salvage expenses over and  
[\*757] above the £1200 (2 Q. B. D. 501). \* The plaintiff, the  
shipowner, appealed against the last part of the decision; the defendant, the underwriter, appealed against the first part. The judgment was affirmed as to the claim for the expenses of repair, but it was reversed so far as related to the salvage expenses, they being added to the amount for which the policy was underwritten (3 Q. B. D. 558). This appeal was then brought.

Mr. Benjamin, Q. C., and Mr. J. C. Mathew, for the appellant:—

There was no total loss; if there had been, the underwriter would have been liable upon that, but then he would have had the benefit of salvage. There was only a partial loss, and that being so, the underwriter cannot be made liable to the full amount of the sum insured, as if there had been a total loss, and made so liable without benefit of salvage. Yet that is the claim here. Such a claim cannot be supported. “A partial loss is one in which the insurers are liable to pay an amount less than that insured for damage happening to the subject, or expense incurred and occasioned by the perils insured against, in distinction from a total loss, in which the insurer is liable to pay the entire value

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at which the subject is insured." Phillips on Insurance, chap. xvi. s. 1422. What is sought to be done here would completely destroy that distinction, and subject the insurer to the payment of a larger amount than if the subject had been entirely lost. It is admitted that the assured is not bound to abandon; all the authorities agree in that. Phillips, chap. xvi. s. 1493. But then he must not repair at a cost which exceeds the sum insured, and make a profit at the expense of the insurer, for an insurance is not to become a source of profit to the assured. Emerigon, chap. i. s. 3. The assured is entitled under his policy to be indemnified against loss, but not to be put, at the cost of the insurer, into a better position than at the commencement of the voyage and before any loss had happened. If he could do that, he could in this case charge for the metalling of the ship, which was admitted to be entirely out of the calculation. As the case now stands, the assured, by getting a ship worth £7000, instead of £3000, will be largely benefited. That was not the intention of a policy of insurance, which is purely a contract of indemnity.

And it is undoubtedly clear that the insurer is not liable for the \*salvage expenses. They do not properly come [\*758] within the meaning of the suing and labouring clause. Such expenses are only chargeable when incurred with the object of avoiding a total loss, or of reducing a total loss to a partial loss; in other words, for the benefit of the insurer. Arnould (5th ed. p. 245, 779). They could not in any way benefit the insurer here, for there had been no abandonment, and, except upon abandonment, he cannot obtain anything from salvage. That was the position laid down by Mr. Justice LUSH in delivering the judgment of the Queen's Bench Division (2 Q. B. D., at p. 508), and that is the reasoning in Phillips on Insurance on this question (chap. xvii. s. 1716). The case of *Kidston v. The Empire Marine Insurance Company*, L. R. 1 C. P. 535, affirmed L. R. 2 C. P. 357 (p. 247, *ante*), did not establish the construction for which the assured now contends, for that was the case of an insurance on freight: the expenses were incurred in order to save the freight, and the freight was saved, and the underwriter was in that way subjected to a smaller loss, and so the suing and labouring clause was held to apply, but it had no application to this case. There is nothing in common between the two cases. But even in that case Mr. Justice WILLES (L. R. 1 C. P. 550) expressly says,

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"That clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion." He could derive none here, and so was not to be made liable for the expenses of that exertion.

Mr. Cohen, Q. C., and Mr. F. W. Hollams, for the respondent, were desired to confine themselves to the second point, that which related to the claim for salvage expenses.

Those expenses were absolutely necessary to be incurred, and were like those which were incurred in getting a ship off rocks in order to bring it into dock to be repaired; and such expenses were always held to be properly included in the expenses for repairs. In *Lidgett v. Secretan*, L. R. 6 C. P. 616, no doubt was suggested as to all the expenses incurred in bringing the vessel into dock, and the dock dues for keeping it there, up to the time of the fire which destroyed it. There is not, in the suing and labouring clause, any expression of such a restrictive meaning as [\*759] is now sought to be put on that \* clause. On the contrary, the insurer binds himself to contribute to the charges in the "defence, safeguard, and recovery" of the goods and ship, and sums paid for labour and exertions in securing the vessel from total destruction may well come within that description.

Mr. Mathew replied.

Lord BLACKBURN:—

My Lords, in this case the respondent insured £1200 on a ship, the *Crimea*, valued in the policy at £2600, with the appellants' company, on a voyage out and home. The policy was against all the usual perils, and contained the usual suing and labouring clause.

The appellants paid into Court £1080, being at the rate of 90 per cent on £1200, and the question was whether, under the circumstances stated in a special case, this sum was sufficient, or, if not, how much more the plaintiff below (the respondent in this House) was entitled to recover. The Queen's Bench Division was of opinion that the amount recoverable was £1200, or 100 per cent, and gave judgment for £120 beyond the amount paid into Court. Both sides appealed, and the Court of Appeal was of opinion that the sum recoverable was 100 per cent in respect of the direct damage to the ship, and a further percentage in respect of the salvage and general average charges. The record was so

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imperfectly drawn up that it does not appear on it what was this further percentage. The counsel at the Bar of this House agreed that if the judgment of the Court of Appeal was affirmed, that percentage should be some rate which they agreed on between themselves. Some anxiety was expressed lest it should be supposed that in sanctioning this agreement this House would determine some question of principle which was given up by one side or the other as of no practical importance in this case, though it might be of importance in other cases. The House certainly determines no such point, and, indeed, was never informed what this point was.

It appears from the statements in the case that the *Crimea*, on the voyage home during the month of January, encountered a succession of stormy weather, and in consequence of the perils of \* the seas great damage was done to her, and she was [\* 760] reduced to a leaky and water-logged condition. It appears, incidentally, that some general average had arisen, for a proportion of which the ship was liable. The case then states that "On the 30th of January, the ship, being then in great danger of being completely lost, and being without fresh water or provisions, and in a helpless condition, and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into Queenstown, and on or before the 11th of March she was placed in safety near the wharf of the Victoria Dry Dock Company."

It may be as well here to point out that the liability of the articles saved to contribute proportionally with the rest to general average and salvage, in noways depends on the policy of insurance. It is a consequence of the perils of the sea, first imposed, as regards general average, by the Rhodian law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of. No claim for remuneration from the owner is given by the common law to those who preserve goods on shore, unless they interfered at the request of the owner. *Nicholson v. Chapman*. There Chief Justice EYRE, in delivering the considered judgment of the Court, says (2 H. Bl. 254, at 257, 3 R. R. 374, 375), that in respect of salvage, "the laws of all civilized nations, the laws of Oleron,

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and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien on the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence, and the most strenuous exertions of the mariner, cannot protect them. When goods are thus in imminent danger of being lost it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to [\*761] civilized and commercial countries not \*only the propriety but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. . . . Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice HOLT in *Hartfort v. Jones*, 1 Ld. Raym. 393."

The *Crimea* had been, before these disasters, worth £3000; as it then lay, in a damaged condition, it was of the value of £998. The damaged ship was liable to make good its proportion of the general average and of the salvage incurred for the preservation of ship, freight, and cargo; and that proportion of the two, taken together, amounted to £519 0s. 1d.

My Lords, I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances. If such an uninsured owner chose to sell the hull as it lay, his position would be this: He would lose the value of the ship, £3000. He would receive £998, the value of the hull, less £519, the amount of general average and salvage, which was a charge on the hull, or £479; and his loss would be £2521. And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent shipowner would have taken this course. But, in fact, he not only could, but did repair it, and by an outlay of about £5600 (part of which, about £1200, was for new works), he made the ship worth £7000; and then (still assuming him to be uninsured) his position would have been this: Original value of ship, £3000; salvage and average, £519; expenditure, £5600; total, £9119; value of repaired ship, £7000; loss £2119, to which are to be added some particu-

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lar charges amounting to apparently £235, bringing the loss up to £2354.

The contract of insurance is a contract of indemnity, and, if it could be worked out as a perfect indemnity, it would follow that 90 per cent, the sum paid into Court, which on £3000 amounts to £2700, was more than sufficient. But as was said in the opinion of the Judges in *Irring v. Manning*, 1 H. L. C. 287, at p. 307, "A policy of assurance is not a perfect contract of indemnity; it must be taken with some qualifications." One of those is commonly expressed as the allowance of one-third new for old; and it is on the \*application of that to the present [\*762] case that the first question arises.

The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Mr. Justice MAULE, in *Moss v. Smith*, 9 C. B. 94, at p. 103, 19 L. J. C. P. 225, at p. 228, the assured has not the option to treat it as a total loss; and on the figures stated in the special case, the respondent here had not that option. He may repair the damage done by the peril insured against, and if he does so the damage would, in general, be what would be the reasonable cost of making the ship as good as it was before. The actual outlay on the repairs, if *bonâ fide* made, would be strong evidence what the reasonable cost was, and if the ship was by that outlay made more valuable than it was before the accident, which would generally be the case with an old ship, there should be an allowance for this increased value. It is obvious that, applying this, there would be great room for disputes and litigation on the adjustment in every case where repairs were executed, whether the repairs were extensive or not.

In the present case, where the ship was fifteen or sixteen years old, and the damage was extensive, it is probable, as is said in the judgment of the Queen's Bench Division, that the extent to which it was benefited by having new materials instead of old was much more than one-third of the expenditure; probably two-thirds might be nearer the fact. But I think that it is clearly established by a long course of practice, and by many decisions, that,

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for the purpose of avoiding the expense of litigation, a custom of trade has arisen which, though not written in the policy, is implied in it. The parties to a policy of insurance on a ship tacitly agree that, in case of repairs fairly executed to replace damage occasioned by one of the underwritten perils to a ship of the age and character to which the custom applies, the loss shall be estimated at two-thirds of the cost of the repairs, neither more nor less. It is self-evident that this can very seldom [\*763] \* be the accurate measure of the loss. In most cases the rule operates favourably for the underwriter, as the ship-owner in spending money on repairs seldom benefits his ship to the extent of one-third, and in such cases the payment of the sum so fixed by custom falls short of a perfect indemnity. In some cases, and this is one, the benefit to the ship exceeds one-third, and there the assured receives more than a perfect indemnity. But if it were lawful to open up the question and depart from the rule in any case, the whole object of it, which is to avoid litigation and expense, would be frustrated. No authority has been cited, and as far as my knowledge goes, no authority exists, for any qualification of the general rule which would take this case out of it. If the rule applies, two-thirds of the expenses of repairing the sea damage are to be charged to the ship. The expenses of making additions to the ship are not, of course, to be charged: they are not in any way a consequence of the perils of the sea. The arbitrator has found that the expenses to which the rule is applicable were £4414 18s. 11d. This finding is binding. Now two-thirds of this sum is, in round numbers, £2943, or very nearly 100 per cent on £3000. According to the finding in one paragraph, there are other particular charges on the ship, the nature of which is not stated, which bring up the loss to £3178 11s. 7d., which is more than 100 per cent; and if the salvage and general average expenses are added the loss will be very considerably more than 100 per cent.

In Phillips on Insurance, sect. 1743, see also sect. 1136, that very experienced author finds great fault with the decision of the Court of Common Pleas in *Le Cheminant v. Pearson*, 4 Taunt. 367, 380 (13 R. R. 136), so long ago as 1812, that more than the subscribed amount may be recovered where there are successive losses, which he seems to think can only be supported on the ground of inveterate practice. No question, however, of that

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kind arises here, for this is a case of one single loss; as to which he says that we know “the liability of insurers in a single loss is, without question, limited to the amount insured, and the expense of suing,” &c. No authority in contradiction to this was cited, and I am not aware of any; and the position thus laid down in Phillips was adopted by all the Judges below, who consequently \*limited the amount recoverable under the policy, [\*764] as far as it related to the indemnity for the underwritten perils, to 100 per cent, or in this case £1200, or £120 beyond the amount paid into Court. I think it clear that they were right both in going so far, and also (which I think was scarcely contested at the Bar) in not going farther. On this, the first question, on which both the Courts were agreed, the judgment below should be affirmed.

But there is a second point on which the Courts below differed. The policy contains the usual clause as to suing or labouring. The Queen’s Bench Division was of opinion that the salvage, or general average expenses, described in the case did not come within that clause. The Court of Appeal was of a different opinion. In the judgment delivered by Lord Justice BRETT, it is said (3 Q. B. D., at p. 566) that “the general construction of the clause is that if, by perils insured against, the subject-matter of insurance is brought into such danger that, without unusual or extraordinary labour or expense, a loss will very probably fall on the underwriters, and if the assured, or his agents or servants, exert unusual or extraordinary labour, or *if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss*, which, if it occurs, will fall on the underwriters, then each underwriter will,” &c. Now if the part of this which is above emphasised is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of Arnould on Insurance, who says (2 Arn., 5th ed., at p. 778) that salvage “is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labour clause;” but for that position he cites no authority, and though the Court of Appeal in this case agreed with him, I am unable to do so. With great deference to the Judges of the Court of Appeal, I think that general average and salvage do not come within either the

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words or the object of the suing and labouring clause, and that there is no authority for saying that they do. The words of the clause are that in case of any misfortune it shall be lawful "for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence. [\*765] \*safeguard, and recovery of" the subject of insurance.

"without prejudice to this insurance, to the charges whereof we, the insurers, will contribute." And the object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose; but the object was to encourage exertion on the part of the assured, not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not this case. The owners of the *Texas* did the labour here, not as agents of the assured, and being to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice EYRE, in *Nicholson v. Chapman*, 2 H. Bl., at p. 257 (3 R. R. 375), already cited, gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril; see *Cary v. King*, Cas. t. Hardw. 304; and I have not been able to find any case in which it was recovered under a count for suing and labouring. I do not much rely on this, for it is very likely

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that such counts often were in the declaration, and that therefore no inquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for the \* position that salvage (properly so called) was recoverable under that count. [\* 766]

There have been very few cases in our Courts in which it has become necessary to discuss the nature of the suing and labouring clause. *Kidston v. The Empire Marine Insurance*, L. R. 1 C. P. 535 (p. 247, *ante*), is, I think, the only one in which there has been a recovery under it. There, however, all the extra labour was directly and voluntarily employed by the agents of the assured; and the charges were paid by them in consequence of this employment. In the very able and elaborate judgment of Mr. Justice WILLES not a word can be found to countenance this extension of the construction of the clause beyond what seems to me both its language and its object; and, except the passage introduced for the first time into Arnould by the present editor, I can find nothing in any text-book tending to support it. I therefore think that the judgment of the Court of Appeal should be reversed, and that of the Queen's Bench Division restored.

As there are cross-appeals, and neither party is completely successful, I should say that there should be no costs of either party either in the Court of Appeal or in this House, and that the respondents should have only the costs in the Queen's Bench Division as given by that judgment. I beg to move your Lordships to that effect.

The LORD CHANCELLOR (Earl CAIRNS):—

My Lords, I have had the advantage of reading the observations which my noble and learned friend has just made in this case, and concurring, as I do, entirely in the view which he has taken, I do not think it necessary to travel over the same ground again.

I will only make one observation with regard to salvage expenses. It appears to me to be quite clear that if any expenses were to be recoverable under the suing and labouring clause, they must be expenses assessed upon the *quantum meruit* principle. Now salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general principle of maritime law, which gives to the persons who bring in the ship a sum quite \* out of proportion to the actual expense. [\* 767]

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incurred and the actual service rendered, the largeness of the sum being based upon this consideration, — that if the effort to save the ship (however laborious in itself, and dangerous in its circumstances) had not been successful, nothing whatever would have been paid. If the payment were to be assessed and made under the suing and labouring clause, it would be payment for service rendered, whether the service had succeeded in bringing the ship into port or not.

Now it may be said that that only goes to the amount sought to be recovered, but it appears to me to go further, and to go to the very principle upon which the attempt is made to recover the amount in question. It shows that the salvage expenses were not expenses incurred under the suing and labouring clause by the owner of the ship, but were a payment which the ship, as an actual chattel, had to submit to by maritime law, and would be obliged to make good in proceedings against the ship *in rem*.

My Lords, as regards the order which this House should be asked to make, I wish to point out to your Lordships that in the Court of Appeal there were an appeal and a cross-appeal against the decision of the Queen's Bench Division. There was an appeal by the underwriters, upon the ground that they ought not to have been made to pay the whole sum insured; and there was a cross-appeal by the shipowner in respect of these salvage expenses, which the Queen's Bench Division had not allowed. The appeal by the underwriters was dismissed with costs, and that decision appears to me to have been perfectly right. The cross-appeal by the shipowner in respect of salvage expenses succeeded, with costs, in the Court of Appeal. Your Lordships, I think, will reverse that decision, and of course that would dispose of the costs as to that cross-appeal. Then, inasmuch as there is only one appeal before this House — the appeal by the underwriters, who complain now both of the determination which has made them pay the 100 per cent, the full insurance, and also of that which has made them pay the salvage expenses; and as they will succeed, as I should think, upon one of those points, and fail upon the other, your Lordships will, I assume, think it right that there should be no costs of the appeal to this House. Therefore, what [\*768] \* I should propose to your Lordships would be, that the judgment of the Court of Appeal, in so far as it varied the

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judgment of the Queen's Bench Division, should be reversed; that the judgment of the Court of Appeal, in so far as it dismissed the appellant's appeal against the judgment of the Queen's Bench Division, be affirmed; and that your Lordships should declare that the cross-appeal to the Court of Appeal ought to have been dismissed with costs, and order costs to be paid accordingly; and that there should be no costs of the appeal to this House.

Lord HATHERLEY:—

My Lords, I only desire to say that I entirely concur in the opinions which have been expressed by my noble and learned friends. I have had an opportunity of perusing the opinion which has just been delivered by my noble and learned friend opposite (Lord BLACKBURN), and having read it carefully, I may say that upon both the points of the appeal upon which he has touched I concur in the view he has taken, namely, that it is very clear that the damage done extends to 100 per cent, that is to say, extends to the whole amount of the money insured; and that it is equally clear, as it seems to me, that the suing and labouring clause was inserted by the underwriters for the purpose of securing the benefit of any pains that the shipowner might be inclined to take in preserving, for their benefit, as much as he possibly could preserve. But that does not apply to a case like the present, where the salvage seems to have been an ordinary sort of salvage; namely, a ship perceiving another at a distance and in a state of distress comes to the rescue, no bargain being made. We were expressly told in the case that no bargain was made as to any remuneration which should be given, but it was rescued upon the simple and common principle of salvage. There does not appear to be any authority showing it to be a case coming within the suing and labouring clause. I think, therefore, that the separation of the two points has been correctly made, and that your Lordships should concur on the one point in the judgment pronounced by both the Courts below, and on the other point in the judgment pronounced by the Queen's Bench Division, as distinguished from that pronounced by the Court of Appeal.

\* Lord O'HAGAN:—

[\* 769]

My Lords, I also have had the advantage of perusing the very careful and exhaustive opinion which has been read by my noble and learned friend (Lord BLACKBURN). I entirely con-

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cur in the substance of that opinion, and I feel that I could add nothing of material value to the reasonings and conclusions it has so well expressed.

I have had some grave doubts as to the second point with reference to the operation of the suing and labouring clause, but, upon the whole, I do not see sufficient reason to differ from the views which have been adopted by your Lordships.

*Ordered:—That the judgment of the Court of Appeal in so far as it carried the judgment of the Queen's Bench Division be reversed.*

*That the judgment of the Court of Appeal in so far as it dismissed the appellant's appeal against the judgment of the Queen's Bench Division be affirmed.*

*Declared that the cross-appeal to the Court of Appeal ought to have been dismissed with costs; costs ordered to be paid accordingly.*

*No costs of appeal to this House.*

Lords' Journals, 31st July, 1879.

### Pitman v. Universal Marine Insurance Company.

9 Q. B. D. 192-219 (s. c. 51 L. J. Q. B. 561; 46 L. T. 863; 30 W. R. 906).

[192] *Insurance.—Partial Loss.—Insurance on Ship.—Injury by Perils insured against.—Owner selling instead of repairing.—Mode of estimating Liability of Underwriters.*

Where a ship that is insured is injured by perils insured against, and the owner, instead of repairing, sells her during the continuance of the risk, the loss to be made good by the underwriters depends on the depreciation in the value of the ship, and not on the amount that it would have cost to repair her with an allowance in respect of new materials for old.

The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values, if no other means can be found for arriving at the loss really sustained.

The depreciation in value is to be ascertained by taking the value of the ship, if sound, at the port of distress, and her value there in her damaged condition. To ascertain the liability of the insurers, the proportion so arrived at should be applied to the real value of the ship at the commencement of the risk, if the policy be open, or to the agreed value if the policy be valued.

So held, by LINDLEY, J., affirmed (except as to the mode of ascertaining the depreciation in value) on appeal by the majority of the Court, JESSEL, M. R., and COTTON, L. J.; BRETT, L. J., dissenting.

Held, by BRETT, L. J., that the matter against which the owner was indem-

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nified was the cost of repairs and not any diminution in the saleable value of the ship, and that therefore loss or gain by the sale of the ship was outside the contract of insurance and was not a matter to be considered between the assured and the underwriter in adjusting either a total or partial loss on ship.

Further consideration.

The plaintiffs were the owners of the barque *Thracian*, and by a policy of insurance bearing date the 3rd of June, 1875, caused themselves to be insured for twelve calendar months upon the ship, valued at £3700. The defendants subscribed the policy for £1000, and it was agreed by memorandum that the insurance should commence from the 23rd of March, 1875.

The vessel sailed under charter from Singapore to Moulmein on the 24th of July, 1875, and arrived off that port on the 10th of August, 1875, and, in passing up the river to the port of Moulmein, took the ground, and remained aground until the 14th of the same month, when she was got off and towed up to Moulmein. \* The plaintiffs determined to [\*193] abandon the vessel, and gave notice of abandonment, but the underwriters declined to accept it. The plaintiffs then, having made some slight repairs, sold the ship and stores for £3897.

In the statement of claim the plaintiffs alleged that the value of the ship at the commencement of the risk was £4000, and that she was injured by perils insured against by the policy, and claimed £781 7s. 10d. as a partial average loss under the policy. The defendants paid £245 into Court.

The case was tried in May, 1881, before LINDLEY, J., who reserved for further consideration the question upon what principle the loss was to be ascertained.

June 25, 1881. Butt, Q. C. (Pollard with him), for the plaintiffs. — The question is whether the plaintiffs are entitled to the costs of the repairs, or only to the difference between the sound value of the ship and the net proceeds of the sale. The plaintiffs gave notice of abandonment, which was refused, and the defendants now ask to be placed in the same position as if they had accepted notice or to treat the loss as total with benefit of salvage. The sale and the proceeds of it have nothing to do with defendants' liability, except for the purpose of ascertaining the proportion. Arnould Marine Insurance, 5th edit., p. 901; *Knight v. Faith*, 15 Q. B. 649. [He referred also to *Lidgett v. Secretan*,

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L. R. 6 C. P. 616; *Lohre v. Aitchison*, 2 Q. B. D. 501; *Stewart v. Steele*, 5 Scott N. R. 927; and *Brooks v. MacDonnell*, 1 Y. & C. 500.]

Cohen, Q. C. (Hollams with him), for the defendants.—The defendants in estimating the amount which they have paid into Court have followed the law. *Attwood v. Sellar*, 5 Q. B. D. 286 (p. 386, *ante*). In *Lohre v. Aitchison* there was more than a strict indemnity. The time at which loss is to be ascertained is the termination of the risk, not the time when the damage was done. *Knight v. Faith* was wrongly decided. See *Potter v. Rankin*, L. R. 6 H. L. 83, and *Kaltenbach v. Mackenzie*, 3 C. P. D. 467.

Butt, Q. C., in reply.—The owner has always a right [\*194] to repair, \* and whether he does so prudently or imprudently, can call on the insurers to pay up to the amount insured. The defendants say that if the vessel is worth £7000 when repaired, and the repairs cost £7500, then the insurers are not liable for anything, which amounts to saying that the assured must abandon, which they are never obliged to do. See Phillips, 1494. It is a wrong principle to compare the damaged value at Moulmein with the sound value in England, and the inconvenience of having to ascertain the sound value at Moulmein is apparent. Lowndes on Insurance, 309–310.

*Cur. adv. vult.*

1881, July 4. LINDLEY, J.—This is an action on a time-policy for a partial loss, and the question I have to decide is the principle upon which the loss is to be ascertained, it being agreed that all questions of figures shall be referred to some gentleman versed in adjustments. The facts which are material are few and simple, and are set out in the claim. They are shortly these, that the plaintiffs were the owners of the barque *Thracian*, and by a policy of insurance dated the 3rd of June, 1875, they caused the vessel to be insured with the defendants for a period of twelve months from the 23rd of March, 1875, the vessel being valued at £3700, and the defendants subscribed themselves for the sum of £1000. The vessel sailed on the 23rd of March from Launceston, in Tasmania, for Newcastle, New South Wales, where she arrived on the 3rd of April. She then sailed with a cargo of coals on the 6th of May to Singapore, and she arrived and discharged her cargo in June, 1875, that is to say, she was in Singapore when

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the policy was signed. Then the vessel was chartered to proceed to Moulmein, and take in a cargo of teak. She grounded there, and the value of the vessel at the time of the commencement of the risk was £4000. Those are, in substance, the facts. The vessel injured grounded on her way to Moulmein, and after remaining aground four days in some peril, she was got off and towed to Moulmein. She was there examined, and was found to be seriously injured. The plaintiffs resolved to abandon her to the underwriters, and gave notice of abandonment. The underwriters, \* however, declined to accept her, and re- [\*195] quired the plaintiffs to repair her. The plaintiffs did not insist on their abandonment, but, acting on the best advice they could obtain, determined not to repair her, but to sell her, and, after making some slight repairs, they accordingly did sell her and her stores for £3897. Upon the evidence before me, and having regard to the want of proper dock accommodation and appliances at Moulmein, and the high charges there, I have come to the conclusion that the cost of repairing her so as to make her as good as she was before she grounded would have been about £5300, which is more than her value when repaired, such value being £4500 or thereabouts. I have further come to the conclusion that it was not practicable to examine her bottom and to repair her temporarily, so as to enable her to continue her voyage in safety, without docking her and spending much more upon her than such temporary repairs would justify. In other words, I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling her in her damaged state, and substantially as she was when brought into a place of safety. Under these circumstances the plaintiffs have brought an action against the defendants to recover the amount of the loss sustained by the plaintiffs by reason of the injury to the ship by her stranding. The plaintiffs are clearly entitled to recover something, and the question is how much? The plaintiffs claim £781 7s. 10d. The defendants have paid into Court £245. The difference between the parties is attributable not to any dispute about figures, but to the circumstance that they differ entirely as to the principle upon which the calculations are to be based. The plaintiffs contend that the loss to be made good is to be measured by what it would have cost to repair the ship and make her as good as she was before

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she was injured, but deducting one-third of that cost so as to allow for new materials instead of old; whilst the defendants contend that this is an entirely erroneous principle, and that the loss to be made good is to be measured by the difference between the value of the ship when sound and what she sold for when damaged. The question for my decision is, which of these two

principles is correct? It is certainly remarkable that the [196] question thus raised should never \* have been yet decided,

but such seems to be the case, and it consequently becomes necessary to consider the question on principle. The first thing which strikes the mind on a consideration of the foregoing statement is that, apparently at least, if not really, the plaintiffs are contending for a right to be indemnified against a loss which they have not in fact sustained. The repairs, the cost of which the plaintiffs seek to make the measure of their loss, were not in fact made. It becomes necessary, therefore, to be careful before an hypothetical as distinguished from an actual loss is held to be the loss in respect of which the plaintiffs are entitled to indemnity. The plaintiffs' contention is based upon the following assumptions: 1, That they might have repaired if they had chosen; 2, That if they had repaired, the cost of repairs would be the measure of their loss; and 3, That it is immaterial to the defendants whether the repairs were actually effected or not. The first of these assumptions I take to be well founded: the assured is never bound to abandon; it is for him to determine whether he will do so or not; he can always repair if he chooses, and refrain from insisting on a total loss. This has been decided long ago, and I may refer amongst other cases to a discussion on this subject: *Peele v. Merchants' Insurance Co.*, 3 Mason, 27, a case in which the rights of an assured in the event of stranding were elaborately examined by STORY, J. The second assumption is also well founded if the repairs are made *bonâ fide* and with reasonable discretion. Nothing can be stronger than the language of STORY, J., on this point, in the case just cited. He says (p. 64): "The insured is in no case bound to abandon. He may in all cases elect to repair the damage at the expense of the underwriter, and if he acts *bonâ fide* and with reasonable discretion, there is no decision yet pronounced which declares that he shall not be entitled to a full compensation, however great it may be, even if it should equal or even exceed the original value of the ship; and until

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such a decision is made, the direct terms of the policy seem strong enough to justify such a claim." See also 2 Arn. Ins. 1022, 3rd ed.; and 2 Phill. Ins., s. 1426. But although this unquestionably is true, still, if the repairs are so extensive and so out of proportion to the value of the ship when \* repaired as to [\* 197] show a want of *bona fides*, or a total disregard of what is reasonable, it is by no means clear that their cost could be thrown on the underwriter. In fact, it is tolerably plain that it could not. The language of MAULE, J., on this head in *Stewart v. Steele*, 5 Scott N. R. 927, at p. 950, is extremely cogent and valuable. He said: "As to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy; and the frequent statement of the proposition will not make it less fallacious; the law casts no such duty upon them. The assured is entitled to recover the amount by which the ship is deteriorated in consequence of the accident." This appears to me to be perfectly accurate, and I adopt it accordingly. The third assumption, viz., that as the plaintiffs had the right to repair the ship and to recover the cost from the underwriters, it is immaterial to them whether the right is exercised or not, is, in my opinion, entirely erroneous and opposed to the true principles of contracts of indemnity. Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained. If in such a case the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against, the assured can only claim for a total loss; he cannot claim both for a total loss and for the previous partial loss, as he may, if the damage has been actually repaired. Compare *Stewart v. Steele*, 5 Scott N. R. 927; *Livie v. Janson*, 12 East, 648 (11 R. R. 513); *Lidgett v. Secretan*, L. R. 6 C. P. 616. These cases are conclusive to show that the events which have happened, and not those which might have happened, are to be regarded. Apart from all authority, I should have thought it plain that a loss actually sustained under circumstances which did happen is to be

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preferred as a measure of indemnity to a loss which would have been sustained under circumstances which did not happen, [\* 198] and the cases to which I have referred \* show that this principle is recognised as well in cases arising under marine insurance policies as in other cases of indemnity. Upon principle, therefore, it appears to me that the plaintiffs' contention cannot be supported. It is, however, said to have authority and practice in its favour. The authorities referred to are *Knight v. Faith*, 15 Q. B. 649, and *Lidgeott v. Secretan*, L. R. 6 C. P. 616; the practice is that of underwriters. In *Knight v. Faith* the ship was damaged and sold unrepairs for £72 10s. The assured claimed for a total loss; but as there was no destruction of the ship, and no notice of abandonment, it was held that the assured could only recover for a partial loss. The proper mode of ascertaining the amount of this loss was not discussed, but there is a passage in Lord CAMPBELL's judgment at p. 669, which I will read: "We therefore think that in this case the ship insured sustained a partial loss from which the assured ought to be indemnified. But they have left us entirely in the dark as to the amount of that indemnity. Their counsel has contended that, even on the footing of a partial loss, the verdict ought to stand for the full amount of the sum insured and interest. However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon them to show the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing it, and from this there would be the usual deduction of one-third new for old. There having been no notice of abandonment, although the ship subsisted as a ship, we cannot proceed upon the supposition that she could not be repaired, and the partial loss must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired, soon after the policy expired. 'Such a calculation,' says Benecke, vol. ii. p. 499, 'cannot be governed by any general rule, but must be decided according to circumstances and upon a casual estimate in which no great precision can be expected, since it is extremely difficult after the ship has perished to obtain a precise knowledge of the condition in which the ship was at the termination of the fixed time. But this difficulty can never be a ground for freeing the insurer from all liability.' The

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\* difficulty is not greater than was experienced in *Hare* [\*199] *v. Travis*, 7 B. & C. 14 (31 R. R. 139), where, there having been a policy upon pearl ashes at and from Liverpool to London, and the ship having deviated by going into Southampton, and the pearl ashes having been injured by sea damage both before and after the deviation, but never having been examined till they arrived in London, it was left to the jury to say what amount of damage they had sustained while protected by the policy." What ultimately became of this case I have not been able to ascertain; but I cannot regard it as an authority for the proposition that the estimated cost of repairs is in all cases the true measure of loss to the owner of a ship injured and sold without being repaired. Such estimated cost may or may not be the best measure of loss, and in *Knight v. Faith*, 15 Q. B. 649, where the ship sold for next to nothing, it is quite possible that the estimated cost of repairs was a juster measure of the assured's right to indemnity than any other which could be suggested. Where such is the case the estimated cost of repairs will naturally be the basis of the underwriter's calculation, and it may so often happen in practice that this is the proper basis as to lead to the habit of regarding the estimated cost of repairs as the true basis in all cases of the kind under consideration. But care must be taken not to be misled by this circumstance, and not to mistake the rule for the principle on which it is founded. In *Lidgett v. Secretan*, L. R. 6 C. P. 616, the Court does not appear to sanction the proposition contended for by the plaintiffs. In that case the ship was insured by two policies for two successive voyages, viz., out and home. On the voyage out she was stranded and injured. She was partially repaired, and after the risk covered by the first policy had expired, and after the risk covered by the second policy had commenced, but before her repairs were completed, she was destroyed by fire. The Court decided that, although the ship was ultimately lost, and the plaintiff was entitled to recover under the second policy for a total loss, he was also entitled to recover under the first policy the diminished value of the vessel occasioned by her stranding. The estimated cost of repairs was merely referred to as a mode of estimating such \* depreciated [\*200] value; and so far is this case from being an authority for the plaintiffs that it amounts, in my opinion, to a strong authority against them. Mr. Justice WILLES, at p. 626, says: "The true

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principle I apprehend to be this: the owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk, — the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of the value at the expiration of the risk. That, of course, must be subject to all proper allowances." The judgment of Sir MONTAGUE SMITH in that case is to the same effect. The practice relied upon by the plaintiffs was not proved; indeed, the witnesses called to prove it said they had no experience of any settled usage applicable to the case of a damaged ship sold without being repaired. For the reasons and under the circumstances above stated, I am of opinion that the principle contended for by the plaintiffs is erroneous, and that, in substance, the principle contended for by the defendants is correct. The loss sustained by an assured by the stranding of the ship is *prima facie* the depreciation in her value caused by the stranding. Before she stranded she was worth a certain sum; after she stranded she was worth less; the difference between these sums, if it can be ascertained, will be the true measure of the assured's loss, unless he can be shown to have sustained a greater or less loss between the stranding and the expiration of the risk covered by the policy. That this is so in the case of goods is well established; but in point of principle, aid for this purpose, there is no distinction between ships and goods, except that goods being saleable, their sound and damaged values can be readily ascertained by a sale, whilst the values of sound and damaged ships have generally to be ascertained by estimates. This is the view taken by the best text-writers: see 2 Arnould on Insurance, 2nd ed., s. 365; and the rule as to ascertaining damage to the extent of 50 [ \* 201] per cent in America: 3 Kent's Com. 330, 331; \* Phillips on Insurance, s. 1539; and by STORY, J., in *Peele v. Merchants' Insurance Company*, 3 Mason, 27, already referred to. So also the judgments in *Stewart v. Sterle*, 5 Scott N. R. 927, and *Lidgett v. Secretan*, L. R. 6 C. P. 616, support the same view. Whether the values to be ascertained and compared are the values

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at the same place or at different places, and whether they are to be ascertained at the commencement of the risk or at its termination, or immediately before and immediately after the injury is sustained, are questions to be considered, and, having regard to the authorities just referred to, the correct mode of ascertaining the proportion of loss to be made good by the underwriter appears to be to compare the value of the sound ship at the port of distress with her value there when damaged, and to apply this proportion to her real value at the commencement of the risk if the policy be open, or to her agreed value if, as in the present case, the policy be valued. Such being the principle by which to be guided, it remains to apply it to the case before the Court, and to ascertain the value of the ship at Moulmein in her sound and damaged states and to consider the effect of her sale. For these purposes the declared value in the policy must be disregarded; for although such value is conclusive for the purpose of determining how much the defendants may ultimately have to pay, it does not preclude either party from proving the true amount of loss sustained. *Young v. Turing*, 2 Man. & Gr. 593. The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values if no other measure could be found for arriving at the loss really sustained; but in this case other and more reliable evidence of the amount of such loss exists, and the estimated cost of repairs ought not, therefore, to be adopted for the purpose of arriving even indirectly at the measure of the loss sustained. The evidence as to the value of the ship when sound stands thus: The plaintiffs say she was worth £4000 at the commencement of the risk; the defendants are content to adopt this statement. At this date the ship was at Singapore. The time which elapsed between the commencement of the risk and the stranding of the vessel was very short; and the time which \*elapsed between her [\* 202] stranding and sale was also very short; and there is no reliable evidence to show that the value of the sound ship at Moulmein at either of these two periods was greater than her value a short time before when she was at Singapore and the risk commenced. In the absence of such evidence her sound value at Moulmein ought, in my opinion, to be taken to be £4000. In coming to this conclusion I do not forget that her value when thoroughly repaired has been estimated at £4500, nor do I over-

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look the argument that, as she fetched £3800 in her damaged condition, she must have been worth at Moulmein, when sound, much more than £4000. I regard the estimate of £4500 as little better than a guess, and I cannot assume that, if she had been thoroughly repaired, according to Mr. Hopper's estimate, she would not have been more valuable than she was before she stranded, even after making the customary allowance of one-third new for old. The argument deduced from the price she fetched is plausible, but not convincing. I am not at all sure that she did not fetch more than she was worth, and although what she did fetch is conclusive as regards one element in the calculation, I do not regard it as a reliable starting point from which to draw an inference as to her sound value. Upon the evidence before me I hold that value to be £4000. The value of the ship when damaged has next to be ascertained. But the object of this inquiry must not be lost sight of. That object is to ascertain the loss sustained by the plaintiffs, and they have fixed this element in the calculation by what the ship actually sold for. The underwriters may no doubt show, if they can, that the plaintiffs' loss has not been so great as they allege; but the assured cannot possibly increase his actual loss by saying that he would have lost more if the ship had not sold for so much as she in fact realized. This, I apprehend, is what the present Lord Justice LUSH meant when he said, in *Lohre v. Aitchison*, 2 Q. B. D. 510, at p. 507, "If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for." For these reasons it ought to be held that for all the purposes of this action the value of the ship when damaged cannot exceed what she actually sold for. But [\*203] \* even for the purposes of this action the actual price she fetched will not be her exact value, for the price was, no doubt, enhanced by the repairs done to her before sale, and a proper allowance for these must be made. I merely mention this to prevent its being overlooked. The sound value of the ship being taken at £4000, and her damaged value being what she sold for, less such deduction as ought to be made in respect of her repairs before sale, the proportion of loss sustained by the plaintiffs by reason of the depreciation in value of the ship will be ascertained. To this will have to be added whatever other sums

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are properly chargeable against the underwriters; and when the final proportion of loss on this basis has been arrived at, it must be applied to a ship of the declared value of £3700, and the defendant's proportion of the loss thus calculated will be what he will have to pay. Having now explained the principle upon which the amount payable by the defendants is to be ascertained, so far as that amount depends on the point submitted to me, I give judgment for the plaintiffs for such sum as the arbitrator agreed upon shall award to be payable by the defendants, regard being paid to this decision; and I reserve the costs of the action until he shall have made his award.

The plaintiffs appealed.

Dec. 9, 1881. Butt, Q. C., and Pollard for the plaintiffs.

Cohen, Q. C., and Hollams for the defendants.<sup>1</sup>

*Cur. adv. vult.*

June 6, 1882. JESSEL, M. R.—The question in this case is upon what principle ought the liability of underwriters to be determined, when the ship has been damaged by the perils of the sea, and has been sold during the continuance of the risk without being repaired, in a case where the amount required to restore her to the same condition as she was in before the injury would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her. In this instance the value of \* the ship in her damaged state was large, [\* 204] and to have repaired her would, according to the surveyors' report, have caused a loss of 41,000 rupees; viz., 25,000 rupees, the estimated amount of her value unrepaired, and the sum of 16,000 rupees, being the difference between 45,000 rupees, her estimated value when repaired, and 61,000 rupees, the estimated cost of the repairs. It is plain that there being no special circumstances in this case, no reasonable uninsured owner would have repaired the ship so as to restore her to her former condition.

The owners took this view, and therefore determined to sell her, and having made some slight repairs, with a view to a sale, they sold the ship for much more than the estimated value in her damaged state, viz., for 38,000 rupees or thereabouts. The

<sup>1</sup> By direction of the Court, the case was reargued on the 24th of April, 1882, by one counsel on either side.

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underwriters are willing to pay the whole of the loss actually incurred by the owners, viz., the difference between the value of the ship at the port of departure for the voyage, viz., £4000, and the amount of the net proceeds of the sale after deducting therefrom the amount actually expended for repairs, and this, as I read the judgment, is what they are to pay. If there is any doubt as to the meaning of the words on this point, I am willing that it should be removed by altering the wording of the judgment. On the other hand, the owners claim two-thirds of the estimated cost of the repairs required to put the ship in the same condition as she was in before the injury; this proportion of the amount expended for repairs being the sum ordinarily payable by underwriters on the occurrence of a partial loss where the ship is an old one, as this was, and is not repaired. The precise question we have to determine does not appear to have been decided, nor can I find any case in which it has been even discussed; it remains, therefore, to be decided upon principle.

The contract of insurance is, as I understand, a contract of indemnity to the insured against the loss incurred by him through the ship being injured by the perils of the sea. It follows from this that as a general rule in no case can the insured become richer by reason of these perils, or, in other words, that the insured ought not to be entitled to receive from the insurer a larger sum for a single partial loss, than if the ship was wholly lost.

Treating this as in effect a constructive total loss, I consider [§ 205] the amount recoverable to be an amount not exceeding

the value of the ship at the port of departure, but in this case it is not material, because I think the value at Moulmein before the injury was about the same. The estimated value was 45,000 rupees when the vessel was restored to its class, which at the exchange of 1s. 9d.  $\frac{5}{8}$ ths would be a little over £4000, but the vessel would, after repair, have been in all probability rather better than she was before the injury.

This being so, it appears to me that the decision of the learned Judge in the Court below, which was in favour of the underwriters, was substantially right, but I do not wish to be understood as concurring in all the reasons given by him for that decision. It seems to me both on principle and authority that the rights of a

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shipowner, who actually repairs his vessel when damaged by the perils of the sea, to recover the amount or a portion of the amount expended in repairs from the underwriters, are not in all cases the same as those of a shipowner who declines to repair because the ship is not worth repairing, and who therefore sells the ship during the risk, and I wish to confine my judgment to the latter case, which is the case before us.

I am therefore of opinion that the decision appealed from should be affirmed.

BRETT, L. J.—The facts of this case are not in dispute; I do not think it is necessary to repeat them. The case was, at my request, argued a second time before us. Neither before LINDLEY, J., nor before us was it argued that there was a total loss of this ship. Both parties have advisedly confined the decision of this case to be dependent upon the assumption that there was only a partial or average loss of the ship. If they had not done so, I am not at all prepared to say that the finding of LINDLEY, J.,—in which he says, “I find as a fact that a prudent uninsured owner would have done what the plaintiff's did, and that they did what was best for all interested in selling the ship in her damaged state,”—would not, if the assured had elected so to treat it, have justified the sale as against the underwriters, and have made a total loss of \*this ship. But I think that the Court cannot [\*206] decide this case upon such a view of it after the plaintiffs have elected to treat the loss as an average loss, and after the advised persistent arguments on both sides. It appears to me absolutely necessary throughout the consideration of this case to remember that it is to be decided on the assumption that there was only an average loss on ship. The decision of this case upon the facts of it might have been easy and of little importance, if it had been treated as a total loss; but the doctrines suggested in argument, and, as I think, countenanced by the judgment of LINDLEY, J., upon the assumption that this was a partial loss, have made the case to my mind one of the highest mercantile and legal importance.

On the first hearing before us it was contended on behalf of the defendants, first, that if a ship damaged by sea peril is repaired by her owner, so as to be as good as she was before, but a jury find that it was unreasonable so to repair her, the liability of the underwriters must not be ascertained by a comparison with the

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cost of such repairs, but by ascertaining the difference between what the ship would have sold for damaged and unrepaired, and what she would sell for repaired, and by comparing that difference with the value of the ship in the policy. The same argument was put in the following form: secondly, if it is unreasonable to repair the ship so as to make her as good as she was before, the assured, though he may, of course, in fact repair her, cannot so repair her as against the underwriters so as to charge them, and it is unreasonable so to repair her if the cost of such repairs exceed the value of the ship when repaired. And again, in this form: thirdly, where it would be so extravagant as to be unreasonable to repair an injured ship so as to make her as good as she was before, the shipowner ought not to repair her, and if he does, you must in such case ascertain the depreciation in value of the ship caused by the accident by ascertaining the difference between what the ship would sell for, damaged and undamaged, at the same place. And it was urged in each and every of these forms that it was a question for the jury whether a prudent uninsured owner would have undertaken the repairs. It seems to me that the judgment of LINDLEY, J., countenances, if it does not adopt, these arguments.

It must be admitted that they are absolutely new.  
[\* 207] \* In a case where the repairs were actually done, they were the arguments brought forward and overruled in the case of *Lohre v. Aitchison*, 2 Q. B. D. 501, 3 Q. B. D. 558, 4 App. Cas. 755, in all the Courts and in the House of Lords. It need hardly be observed that if the counsel for the defendants could have maintained any of these propositions as true in the case of repairs effected, they would have enforced them easily in a case where no such repairs had been done. It was further argued, fourthly, on the first hearing before us, that whenever the damaged ship is sold without being repaired, the loss is to be ascertained by the same process as a loss on damaged marketable goods is ascertained. This formula would be so damaging to underwriters if the estimate of repairs were low, that, stated in these terms, I think it was at once abandoned. On the second hearing before us none of these arguments were again brought forward.

The arguments for the defendants on the second occasion were that the object of marine insurance is that the assured is to be put in the same position with regard to the subject insured as if he

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had not embarked on the adventure, and if a ship has been injured and not repaired, and a comparison with the estimated cost of repairs would produce a sum greater than the sum which would be due on a constructive total loss, the object is not attained except by paying the same sum as would be payable on a constructive total loss. It was pointed out that if this principle were correct as a principle it would be equally applicable to a case in which the repairs had been done, and that it would in such case break the rule that there is no salvage on an average loss; to which it was answered that there is a custom where repairs have been done, but that there is no custom where repairs have not been done.

It was further argued that repairs must be *bonâ fide* done, and that they cannot be done *bonâ fide* if the cost of them, when done, would exceed the value of the ship when repaired, and therefore that no such possible or contemplated repairs could be considered in estimating an average loss on ship. But it was pointed out and admitted that such repairs might be *bonâ fide* incurred in order to earn a valuable amount of freight.

\* The main argument in the end was that the law which [\* 208] affirms that a contract of insurance is a contract of indemnity, obliges us to say that the assured cannot recover for a partial or average loss more than for a total loss, and that if the comparison with the estimated cost of repairs produces a sum equal to 100 per cent of the sum insured, and the ship be allowed to be sold without the amount of the proceeds of sale being brought into the account, the assured will in such case, by recovering a full 100 per cent, without deduction of salvage, recover more than he would recover for a constructive total loss. This is the argument on behalf of the defendants which has given me so much trouble. As to all the others, I confess that I feel no doubt that they are all untenable. The following propositions are all, I think, recognised as true in insurance law. The assured is not under any circumstances bound to sell his ship. The assured may under any circumstances sell his ship. He is entitled under any circumstances to repair his ship. He is not bound under any circumstances to repair his ship. In none of these respects does any question arise as to whether a prudent owner, uninsured, would act in the like manner. All this is so, because there is nothing in the contract of insurance which takes away from the

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assured the absolute power and right to do with his own property what he will. The assured, therefore, can always, whatever be the amount of damage done to his ship, repair her. If he does repair and keep the ship, there cannot be a total loss; the loss then must be a partial or average loss, leaving open the question of how such loss is to be adjusted. But in the case of a partial or average loss there is no salvage. Therefore, in such case, if the cost of repairs actually done in a reasonable way at a reasonable cost, so as to make the ship equal to what she was before the accident, equals or exceeds 100 per cent of the sum insured, the assured, in respect of such average loss on ship, recovers 100 per cent of the sum insured without any deduction. That was the decision in *Lohre v. Aitchison*, 2 Q. B. D. 501, 3 Q. B. D. 558, 4 App. Cas. 755. The assured need not repair. If he does not, but leaves her unrepaired until the end of the risk, no subsequent total loss intervening, then he is to be compensated as if he had

repaired, only that the cost of the repairs he might have  
[\* 209] \* made must be determined by estimate instead of by actual

expenditure. This proposition is undoubtedly supported in terms by high authorities. "If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is, in case of wooden ships, to deduct one-third from the whole expense, both of labour and materials, which the repairs have cost, and to assess the damage at the remaining two-thirds." Arnould on Insurance, part 3, c. 5, 5th ed. p. 901. He thus points out the mode of arriving at the amount of damage in either case, namely, where the ship has and has not been repaired. Then he applies one common mode of adjusting the loss. "The rule for adjusting a particular average loss on the ship is very simple, viz., that in open policies the underwriter pays the same aliquot part of the sum he has agreed to insure as the damage or the expense of repairing it, is of the ship's value at the commencement of the risk; in valued policies he pays the same proportion of the valuation in the policy." Arnould on Insurance, part 3, c. 5, 5th ed. p. 901. "The partial loss in this case" (says Lord CAMPBELL in *Knight v. Faith*, 15 Q. B. 649, at p. 670), in which case the ship had not been repaired, "must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage,

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or had foundered at sea without having been repaired soon after the policy expired." He admits the difficulty of proof in such cases of the amount of the damage, but says that it can be overcome. WILLES, J., in *Lidgett v. Secretan*, L. R. 6 C. P. 616, seems to me to say, elaborately, the same thing. In none of the authorities, such as Stevens, Benecke, Park, Marshall, Phillips, or Parsons, is any different rule suggested for fixing the amount of damage and adjusting the loss in the cases of the ship having been repaired or left unrepairsed.

If this proposition, as to there being no different rule of ascertaining the amount of damage in the cases of actual repairs done and an estimate of repairs not done, is true, it seems to me to follow, that if the assured does not repair, and does not sell, and the accepted estimate for repairs equals or exceeds 100 per cent of the sum insured, the principle adopted and approved in *Lohre \* v. Aitchison*, 2 Q. B. D. 501, 3 Q. B. D. 550, [\*210] 4 App. Cas. 755, is equally applicable to such a case, as to the case in which repairs have actually been done. The only difference between the two cases is the mode of proving the amount of the damage. But mode of proof does not alter liability. In such a case, then, the assured would recover 100 per cent of the sum insured, and the value of the unrepairsed ship would not be taken into the account. It seems to me to follow that if the assured keep the ship unrepairsed until the expiration of the time fixed in the policy, or, at all events, until the day of trial, he may sell the ship the day after, and the proceeds of such sale cannot be brought into the account. The question in this case is whether, if the sale takes place on the day before the one or the other event, the proceeds of the sale are to be taken into account. All the other propositions advanced in argument are answered by the preceding considerations. And as to this, the first observation which strikes me is, that if the assured after the accident, without repairing the ship, sell her and the policy with her, the assignee of the policy and ship repairs the ship and recovers on the policy for repairs actually done, though they amount to 100 per cent. No inquiry would take place as to the amount realized by the original owner, whether he, by comparison with the cost of the repairs, had gained or lost by selling; the second observation is, that a distinction between a day before and a day after is too minute to have been treated as a distinction by business men;

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and the third, which seems to me, following the others, to be of immense force, is that none of the great masters who have dealt with the subject of the adjustment of an average loss on ship have in any way glanced at a different mode of adjusting such a loss if the ship should be sold before the adjustment or after it. Not one of them has ever alluded to such a rule as has been acted upon by LINDLEY, J., in this case. It is said that the circumstances of this case were never present to their minds. But it is inconceivable to me that Stevens, Benecke, Park, Marshall, Arnould, Phillips, Parsons, writing exhaustive treatises on maritime insurance, should all have overlooked the possibility of such a case arising. The more natural, the more just conclusion seems to me to be that they knew but of one rule of

[\* 211] \*adjusting a partial or average loss on ship.' It is said, further, that the case has never been present to the minds of the great Judges who have enunciated the rule of adjusting an average loss on ship. Is that possible? The circumstance has actually been before them in every case in which the shipowner or master has considered that the damage done to the ship amounted to a constructive total loss, and has thereupon sold her unrepaired, but the owner has failed at the trial to prove that there was a constructive total loss. In every such case the owner has recovered as for a partial loss, and no different mode of calculating the loss from the ordinary mode has been suggested. The point was surely distinctly before Lord CAMPBELL in *Knight v. Faith*, 15 Q. B. 649, where the ship had been sold. And he thus, in such a case, lays down the rule (at p. 669): "However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon the assured to show the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing it; and from this there would be the usual deduction of one-third new for old." It is not possible to my mind that so great a Judge should not have added this caution, if the supposed rule existed: "provided that the proceeds of the sale of the ship must be deducted as she has been, in fact, sold by the master." But I will endeavour further to consider this matter. It seems to me that it can be solved by considering what it is against which the underwriter insures. It is true that the contract of insurance is a contract of indemnity, and that the assured must not be paid more than is sufficient to

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indemnify him against the loss which the underwriter by the contract of insurance has agreed to indemnify. But the question is, What is the loss against which the contract indemnifies? Whatever the assured may gain or lose by the accident, by reason of matter outside the contract of indemnity, is not matter to be considered between the assured and the underwriter in settling the loss which is within the contract. As for instance, if the matter insured is marketable goods; suppose them bought for £100 and insured for £100, and suppose the market to which they were to be carried is so gone down that if the goods arrived there they \* would sell for £50; if the goods are totally lost in [\* 212] the voyage, the underwriter must pay £100; the assured, by reason of the accident, is £50 the better than he would have been if the accident had not happened. The fall of the market being a matter outside the contract of insurance is not a matter to be considered in adjusting the loss, and therefore the assured recovers the £100. So if such goods upon such markets were in the voyage damaged to the extent of 75 per cent, the assured would be entitled to receive £75, and so would be the better by £25 than if the accident had not happened. The question then is, What is the loss against which the underwriter agrees to indemnify? It is the loss which the assured intends to cover, and which the underwriter knows that the assured intends to cover. In the case of an insurance on marketable goods it is known to both that the object of the assured in conveying such goods from one place to another is that they may be sold at a profit. In order that such a result may ensue, they should arrive, and arrive undamaged. If they do not arrive at all, the assured is put in the same position as he was at the beginning of the adventure if he is paid the price at which he originally bought the goods. If the goods are damaged, he is put into that position by being paid a percentage of such price. The identity of the goods is immaterial to him. Goods for purchase and sale are exactly represented by money. But a ship is not in commerce treated by its owner as a subject of purchase and sale in either one market or another. It is used in commerce, as Arnould notices, by its owner as a machine for carrying cargo backwards and forwards for prices determined by successive contracts of affreightment. If the ship be totally lost, the only mode of indemnifying the shipowner, so as to place him in the position he was at the commencement of the risk, is to pay

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him the then value of the ship. But if the ship is damaged, the immediate business inconvenience and loss to the owner is not that a sale of the ship is thereby prevented or injured, but that he is prevented, by reason of the damage, from using the ship as a carrying machine to earn freight. That inconvenience is not to be cured by buying another ship, or by selling the damaged ship. A ship damaged in some distant port, in which she can be repaired, cannot be replaced by the purchase of another ship [<sup>\* 213</sup>] at \* home. The business inconvenience to the shipowner, i.e. the loss in his business, can only be met by repairing the ship so as to make her as good a carrying machine as she was before. That is the object he desires to attain by the insurance. The loss he desires to cover, and which the underwriter knows he desires to cover, is therefore the cost of repairs, not the diminution in value of the ship to sell. The cost of repairs is therefore the matter to be indemnified. The loss in value to sell is not the loss against which the shipowner insured. The injury to or loss by a sale is no more within the purview of the contract of insurance on ship than is the loss of market in the case of an insurance on goods.

Loss or gain by a sale of the ship is therefore not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship. This seems to me the reasoning by which all writers on insurance, and all Judges who have dealt with insurance, have laid down the one and sole rule which they have laid down for the adjustment of a partial or average loss on ship. And as was said in *Lohre v. Aitchison*, 2 Q. B. D. 501, 3 Q. B. D. 558, 4 App. Cas. 755, if this has been accepted as a sole and only rule by merchants and underwriters for many years, it is now a rule which is part of the contract of insurance on ship. According to that rule, no evidence that the ship had been sold, or of what were the proceeds of the sale of the ship, is properly admissible in evidence in an action brought simply to recover a partial or average loss on ship.

As to the case of *Stewart v. Steele*, 5 Scott N. R. 927, it seems to me, I confess, to be the most unsatisfactory case, as reported, with which I have ever had to deal. Every observation made by the Judges during the argument seems to show that their minds were bent to the consideration of a case in which, after a partial damage, the ship is totally lost. In such case it is settled that

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partial damage actually repaired is to be paid for, but that repairs not done are not to be taken into account. Different reasons are given in the final judgments why the cost which would have been incurred if the wales had been replaced was not to be allowed. In simple truth, I do not gather the reason why such cost was disallowed. \* No writer has ever deduced any rule [\* 214] from that case. The case was cited before LINDLEY, J., and before us from 5 Scott's N. R., for the purpose of relying on a supposed *dictum* of MAULE, J., that "as to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy, and the frequent statement of the proposition will not make it more fallacious, the law casts no such duty upon them." The propositions so stated startled me exceedingly. Underwriters have for years paid for repairs. I felt certain it was not correct. And it is not true that MAULE, J., stated such a proposition. What he did state is shown in the report in the Law Journal (11 L. J. (N. S.) C. P. 155). He, in answer to an argument to the contrary, stated that the underwriters had no duty to do the repairs to the ship. That proposition has no effect on the solution of the present case, though it is most undoubtedly true. I would add that none of the terms on the face of the policy can help us to a solution of the present question, because, as is stated by Arnould, a policy on insurance in its present form is mainly construed according to long settled and admitted usage of merchants and underwriters. The defect in the judgment under review seems to me, with deference, to be that it has misapplied the doctrine that a contract of insurance is only a contract of indemnity. It is true that it must not more than indemnify against the loss which it covers; but it is also true that it has nothing to do with gains or losses which are outside the contract by which it undertakes to indemnify against the losses which it does cover. One is naturally startled at the facts of the present case; but they are wholly abnormal, and it is, in my opinion, most dangerous to mercantile business to tamper with a settled rule of adjustment of liability and claim in order to meet a case which will in all probability never happen again. I therefore am of opinion that this appeal and the plaintiffs' claim ought to be allowed.

COTTON, L. J. [after stating the case and commenting on the authorities, concluded as follows]:—

The authorities therefore, in my opinion, do not sup- [218]

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port the contention of the plaintiffs that the estimated cost of repairs, less one-third new for old, is necessarily the measure of the sum to be recovered by the insured, and the reasoning and expressions used by the Judges in the cases tend strongly to show that the estimated cost of repairs which have not been executed is a method, but not, under all circumstances, the only method, of estimating the deterioration of the vessel. To hold that in the present case the insured is entitled to recover two-thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases that the policy is a contract of indemnity, or, to adopt the words of WILLES, J., in *Lidgett v. Secretan*, L. R. 6 C. P., at p. 626, the insured is not entitled to recover more than he lost by the injury sustained by the vessel through the perils covered by the policy.

In this state of the authorities I am of opinion that the estimated cost of repairs, less the usual allowance of one-third new for old, is not, under all circumstances, the sum which the insured is to recover. Where, as in the present case, there is not a constructive total loss, he is not, as against the insurers, entitled to sell so as to bind them by the loss resulting therefrom; but when he elects to take this course, as in the present case, he, as against himself, fixes his loss, that is, he cannot, as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. Probably the [ \* 219 ] most accurate \* way of stating the measure of what, under such circumstances, he is to recover, is that it will be the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale.

It was urged that the Judge in the Court below had no sufficient evidence of what was the value of the vessel at Moulmein in its undamaged state. But this objection cannot, I think, be sustained, and, as he found that this value was the same as that of the vessel at the commencement of the risk, the question as to the proper mode of estimating, from the sale, the depreciation of the vessel does not, I think, arise. It must be observed that in the present case some repairs had been done to the vessel before it was sold, and these have been allowed to the plaintiffs; for, notwithstanding criticisms on the wording of the judgment, I think that it directs the cost of these repairs to be subtracted from

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the proceeds of the sale before these proceeds are deducted from the value of the ship when uninjured, so as to fix the amount of deterioration.

In my opinion the judgment appealed from is right, and the appeal must be dismissed. *Judgment affirmed.*

**ENGLISH NOTES.**

The judgment of the House of Lords in the former of the above principal cases, so far as relates to the effect of the suing and labouring clause, has been adverted to at length in another note, p. 268, *supra*.

The principle of the judgments in the Court of Appeal in the case of *Pitman v. Universal Marine Insurance Co.* is summed up by Lord HERSCHELL in *Marine Insurance Co. v. China Transpacific Steamship Co.* (H. L. 1886), 11 App. Cas. 573, 56 L. J. Q. B. 100, 108, 55 L. T. 491, 35 W. R. 169, as follows : “Where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs less the usual allowances.”

**AMERICAN NOTES.**

The rule of one-third deduction for new for old is recognized in *Humphreys v. Union Ins. Co.*, 3 Mason (U. S. Circ. Ct.), 429; *Potter v. Ocean Ins. Co.*, 3 Sumner (U. S. Circ. Ct.), 27; *Robinson v. Com. Ins. Co.*, ibid. 220; *Dunham v. Com. Ins. Co.*, 11 Johnson (N. Y.), 315; 6 Am. Dec. 374 (although the vessel was new); *Homer v. Dorr*, 10 Massachusetts, 26; *Eager v. Atlas Ins. Co.*, 14 Pickering (Mass.), 141; 25 Am. Dec. 363 (value of old materials used must be first deducted).

*Aitchison v. Lohre* is cited and followed in *Buzby v. Phoenix Ins. Co.*, 31 Federal Reporter, 422, on the point of salvage (*ante*, p. 270).

In cases of constructive total loss, authorizing abandonment, there is conflict in the decisions as to whether the deduction of one-third new for old is to be made in estimating cost of repair. That such deduction is to be made is held in Massachusetts: *Deblois v. Ocean Ins. Co.*, 16 Pickering, 314; *American Ins. Co. v. Ogden*, 20 Wendell (N. Y.), 287; *Globe Ins. Co. v. Sherlock*, 25 Ohio State, 50. That such deduction should not be made: *Bradlie v. Maryland Ins. Co.*, 12 Peters (U. S. Supr. Ct.), 378; *Phillips v. St. Louis Perpetual Ins. Co.*, 11 Louisiana Annual, 459.

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No. 91. — **Palmer v. Blackburn**, 1 Bing. 61, 62. — Rule.

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No. 91. — **PALMER v. BLACKBURN.**

(c. p. 1822.)

RULE.

THE loss upon an open policy on freight is by a general usage adjusted upon the gross freight, although the owner has by the event been saved various charges which he would have incurred if the freight had been earned.

**Palmer v. Blackburn.**

1 Bing. 61-64 (25 R. R. 599).

*Insurance. — Freight. — Mercantile Usage.*

[61] The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a mercantile usage clearly established to the contrary; and usage that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage. — **DALLAS**, Ch. J., *dubitante*.

Assumpsit on an open policy of insurance on freight. At the trial before **DALLAS**, Ch. J., London sittings after Trinity Term last, it appeared that the ship *Juliana*, bound from the East Indies to London, was totally lost just before the termination of her voyage. The freight payable to the plaintiffs in the event of the safe arrival of the ship would have been £3068; but out of this the plaintiffs must have paid £699 9s. for seamen's [† 62] wages, pilotage, light dues, tonnage duty, and \* dock dues; from which payment they were altogether exempted by the loss of the vessel.

The defendant contended that the plaintiffs were entitled to recover from the insurers, not the amount of the gross freight, but only the amount of the net freight, after deducting the charges which the plaintiffs must necessarily have incurred had the ship arrived in safety; and he paid into Court sufficient to cover his proportion of the amount of the net freight.

The plaintiff persisted in demanding the amount of the gross freight, and called merchants of thirty and forty years' experience at **Lloyd's**, who concurred in stating that though open policies on freight were extremely rare, the uniform custom in settling losses

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upon them had been to pay the assured on the amount of the gross freight.

To the admission of this evidence the defendant objected, on the ground that it proposed to establish the existence of a custom contrary to law, a policy of insurance being a contract, the object of which was to secure to the assured a bare indemnity; whereas a usage such as the present would secure to him a profit on, and operate as inducement to, the loss of ship.

The learned Judge having admitted the evidence, subject to future discussion on the point, the defendant called witnesses nearly equal in number and experience, who stated that they were not aware of the existence of the usage stated by the plaintiffs' witnesses.

The jury having found for the plaintiffs the whole demand,

Bosanquet, Serjt., now moved for a rule to show cause why the verdict for the plaintiff should not be set aside, and a nonsuit, or a verdict for the defendant, be entered instead, on the ground that the evidence admitted for the plaintiff ought to have been excluded, and that, at \*all events, the usage established [\*63] thereby was contrary to law, and to the very nature of an insurance. Instead of an indemnity, the owner would, if the usage were sustained, derive a very great advantage from the loss of his ship; in the present instance, in the proportion of near 700 to 3068, in many instances considerably more: indeed, it would be his interest that the ship should be lost as soon as possible after quitting her port of departure, as he would then secure his freight, and be saved the whole expense of paying and provisioning the crew for the voyage, and of defraying the heavy port charges to which he would otherwise be liable. Then, in all adjustments of general average, to which ship, cargo, and freight contributed, the charge on freight was always calculated on the net, and not on the gross freight (Park on Insur. 209, 7th ed.; Marshall on Insur. 467), and if the owner was called on to pay in that proportion, why should he be paid in a greater?

DALLAS, Ch. J.:—

The evidence in support of the usage was as strong as possible: the evidence on the part of the defendant only of a negative character; and I put it to the jury to consider whether the usage was so notorious as to imply a knowledge of it in the parties to the action, and so to form a part of their contract. But the defendant's

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counsel contends that, admitting the existence of the usage, it is contrary to law, — contrary to the very principle of a policy of insurance, as being no more than a contract for indemnity, — opening a wide gate to fraud, and thence that in law it cannot be supported. Without giving any opinion on the subject, I think the point of considerable importance, and worthy of further consideration.

[64] PARK, J.:—

I think a rule ought not to be granted in this case. The chief objection made on the part of the defendant is, that the evidence ought not to have been admitted. I think it was properly admitted on both sides, and, if it was admissible, there can be no ground for a new trial; the jury would have drawn a very wrong conclusion if they had found there was no such usage. They have found that open policies on freight have always been settled in this manner, and my experience entirely coincides with that finding.

BURROUGH, J.:—

In questions on policies of insurance, the course has always been to ascertain the custom of merchants; there is a strong instance of this in 1 Burr. Rep., *Pilly v. Royal Exchange*, 1 Burr. 341 (p. 30, *ante*), where, it being found to be a universal and well-known usage for China ships to unrig and place their tackle in a warehouse on Bank Saul, in Canton River, the insurers on a ship were held liable for a loss happening to her tackle by fire on this Bank Saul. Now, the usage in the present instance is as well known to all the brokers as that was relating to Bank Saul, and in these cases the usage of trade has always been the ground of decision.

*Rule refused.*

#### AMERICAN NOTES.

Parsons cites this case (1 Marine Insurance, p. 253), saying, "The weight of authority, as well as the general custom, is the same here."

In *McGregor v. Ins. Co. of Penn.*, 1 Washington (U. S. Circ. Ct.), 39, it was held that the alleged custom in Philadelphia to strike off one-third of the gross freight for charges, and to pay only two-thirds to the assured in a policy on freight, where a total loss has occurred, is unreasonable, different from the general law of the subject, in direct contradiction of the policy, and illegal. So in *Stevens v. Columbian Ins. Co.*, 3 Caines (N. Y.), 43; 2 Am. Dec. 247, it was said: "Although indemnity is the legal object of insurance, it is not always the criterion by which to ascertain the amount of the loss. No

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general rule giving a specific portion of the freight could with justice be adopted. It would operate unequally by reason of the great diversity in the distance and expense of voyages; and to adopt the net amount of freight as a rule would lead to much litigation and uncertainty respecting the deductions to be made. But to take the gross amount of freight as the rule of damages would be equal, simple, and easily ascertained."

## No. 92.—BRUCE v. JONES.

(EX. 1863.)

## RULE.

If the assured suing on a valued policy has already recovered upon other policies on the same subject-matter, he can recover only the excess (if any) of the value in the policy thus sued on over the amount already recovered.

## Bruce v. Jones.

1 Hurl. & Colt. 769-778 (s. c. 32 L. J. Ex. 132; 9 Jur. (N. S.) 628; 7 L. T. 748; 11 W. R. 371).

*Insurance.—Valued Policies.—Limit to Total Amount to be recovered.*

Where several valued policies of insurance are effected upon the same [769] vessel valued differently, and upon a total loss, the assured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy.

Therefore, where a shipowner effected upon the same ship four policies of insurance, in which respectively the agreed value of the ship was stated to be £3000, £3000, £5000, and £3200, and upon a total loss received under the three former policies sums amounting to £3126 13s. 6d., and then sued upon the latter policy:—*Held*, that, as between the assured and the underwriter of that policy, the value of the ship must be taken to be £3200, and the assured was only entitled to recover the difference between that sum and £3126 13s. 6d.

Declaration on a policy of insurance for £2400 on the ship *Hero*, on a voyage from Cardiff to Manilla, and in which the ship was valued at £3200, and underwritten by the defendant for £125. The declaration alleged a total loss.

Plea (*inter alia*): that the plaintiff made other policies of insurance on the same ship on the same voyage, viz., a policy dated the 30th of July, 1860, in which the said ship was valued at £3000, which said policy was underwritten for sums amount-

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ing altogether to £725; a policy, dated the 8th May, 1861, in which the same ship was valued at £3000, and the policy underwritten for £500; a policy, dated the 20th June, 1861, in which the same ship was valued at £5000, and underwritten for the sum of £3450. Averments: that the said ship mentioned and insured

in each of the said policies was the same ship, and the [\*770] risk intended to be \* covered the same risk; that the said

ship was lost after the making of the said policies, and that divers of the said several insurers upon the said ship, whose names were subscribed to the said policies other than the policy in the declaration mentioned, paid to the plaintiff, and the plaintiff accepted and received of and from the said underwriters, sums amounting altogether to the sum of £3200, and the plaintiff then and thereby became satisfied and indemnified for the said loss of the said ship as agreed upon in the said policy in the declaration mentioned. Issue thereon.

At the trial, before WILLES, J., at the last Liverpool Summer Assizes, it appeared that the policy in question, which was dated the 6th August, 1860, was effected at Liverpool for £2400 on the plaintiff's ship *Hero*, valued at £3200, and was underwritten by the defendant for £125. The loss of the ship having been proved, the defendant gave in evidence three other policies effected by the plaintiff on the same ship for the same voyage, viz., a policy effected at Bristol, dated the 30th July, 1860, for £725, in which the ship was valued at £3000; another effected at Aberdeen, dated the 8th May, 1861, for £500, in which the ship was valued at £3000; and another effected in London, dated the 20th June, 1861, for £3450, in which the ship was valued at £5000. There was conflicting evidence as to the real value of the ship. The plaintiff had received from the underwriters of the Bristol policy £492 6s. 6d., from the underwriters of the Aberdeen policy £684 7s., and from the underwriters of the London policy £1950, amounting in the whole to £3126 13s. 6d.

The learned Judge, in leaving the question of damage to the jury, told them that insurance was a contract of indemnity, and that, for the purpose of the present action and as between the plaintiff and defendant, the value agreed upon and stated in the

policy must be taken as the real value of the ship, [\*771] \* viz. £3200; and that, as the plaintiff was entitled to recover in respect of a total loss, he was entitled to be

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indemnified to that amount; but that the sums which the plaintiff had received on the three other policies, amounting to £3126 13s. 6d., must be deducted from the agreed value; so that there would only be due on the policy on which this action was brought £73 6s. 6d., of which the defendant's proportion as one of the underwriters was £3 16s., which was all that the plaintiff was entitled to recover against him; that the fact that the ship had been valued at a larger sum in another policy ought not to be taken into consideration. The jury found a verdict for the plaintiff for £3 16s.

Brett, in last Michaelmas Term, obtained a rule *nisi* for a new trial, on the ground of misdirection as to the measure of damages; against which

Edward James (with whom was Milward) showed cause (Jan. 23).—The direction of the learned Judge was correct. The plaintiff is only entitled to recover from the defendant the balance of the amount insured, after giving credit for the sums already received by the plaintiff under the other policies. Insurance is a contract of indemnity: if there be an open policy, the assured is entitled to recover the value of the ship; but where there is a valued policy, the sum stated in it is the agreed value as between the parties, and the assured cannot recover more. In *Bousfield v. Barnes*, 4 Camp. 228 (16 R. R. 780), the plaintiff had effected two policies: one for £600, valued at £6000; and the other for £6000, valued at £8000. The ship having been wrecked, the underwriters paid him the £6000, and he then sued upon the other policy. Evidence was adduced that the ship was worth more than £8000, and on that ground it was held that he was entitled to recover. Lord ELLENBOROUGH there said: “I will take care that the \*assured do not recover upon the [\*772] whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity.” Where a person effects two policies of insurance in each of which the same value is declared, he is bound by that sum. *Irving v. Richardson*, 1 Moo. & R. 153; *Morgan v. Price*, 4 Ex. 615. [WILDE, B.] Insurance is a contract of indemnity as respects the true value; and therefore, to the extent to which the assured has been damaged, he is entitled to recover. But where the policy is valued

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the assured is estopped from saying that he has sustained damage to a greater extent than the agreed value.] In Park on Insurance, vol. ii. p. 600, 8th ed., it is said: "Where a man has made a double insurance, he may recover his loss against which of the underwriters he pleases, but he can recover for no more than the amount of his loss." In *Lewis v. Rucker*, 2 Burr. 1167, 1171 (p. 215, *ant.*), Lord MANSFIELD, Ch. J., said: "The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted it at trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity."

Brett and Quain, in support of the rule. — It is not contended that an underwriter is liable to pay more than the agreed value of the ship as between him and the assured, but he is not entitled to any deduction in respect of sums received by the assured on other policies. The sum stated in each policy is not the

[\* 773] actual but the agreed value of the \* ship. It is well known

that the value of a ship varies according to the demand for shipping. It depends on the state of trade, not on the cost of the ship. A ship may be undervalued at one time and over-valued at another, and therefore, to avoid all dispute, the parties agree to a value by which they shall be bound. Here the plaintiff, having sustained a total loss, is *prima facie* entitled to recover the agreed value. The defendant admits the loss, but gives in evidence policies between the plaintiff and other underwriters for the purpose of showing that he has been paid. But those documents being in evidence must be taken for all purposes. For instance, the London policy being given in evidence for the purpose of showing a payment under it of £1950, it must be taken that at the time that policy was effected the ship was of the value stated in it, viz. £5000, and therefore only two-fifths of its value has been paid under that policy. Again, under the Bristol policy £492 has been paid, which is only one-sixth of the agreed value; and under the Aberdeen policy £684 has been paid, which is only seven thirty-seconds of the agreed value. This mode of calculation shows a much larger sum due to the plaintiff on the present policy than was found by the jury. In Arnould on Insurance, vol. i. p. 346, 2nd ed., it is said that the rule established by Lord MANSFIELD is as follows: "In case of over-insurance, the different sets of policies are considered as making but one insur-

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ance, and are good to the extent of the value of the effects put in risk; the assured can recover on the different policies no more than their value, but he may sue the underwriters on either of the policies, and recover from those he so sues to the full extent of his loss, supposing it to be covered by the policy on which he elects to sue, leaving the underwriters on that policy to recover a rateable sum, by way of contribution, from the underwriters on the \*other policy." Reference is there made [\*774] to *Newby v. Reed*, 1 W. Black. 416 (p. 498, *post*), which was a case of open policies, and the question is whether the same rule applies to valued policies in each of which a different value is stated. If the rule contended for by the defendant is to prevail, this strange consequence will follow, that supposing the plaintiff sue on all the policies except the London one, and recovered their full amount, he would receive upon those policies £3625; and he might then sue upon the London policy and recover £1375, being the difference between £3625 and £5000, the agreed value in the London policy. So that the amount which the plaintiff would be entitled to recover would depend upon which policy he first put in suit. The more rational rule is to take the average value of the four policies, by adding together the several agreed values in each and dividing it by four, which in this case would give £3600 as the value of the ship.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. I think my Brother WILLES was quite right in his direction, and that it is fortified by authority and reason. The action is brought on a policy of insurance for £2400, effected on a ship valued at £3200. It appears that the ship was insured by other policies, and that the assured has received on them £3126 13*s.* 6*l.*; and the question is whether he is entitled to recover more than the difference between that and £3200, viz. £73 6*s.* 6*l.* The plaintiff seeks to recover more, on the ground that the sums which he has received on the other policies ought not to be taken into consideration. The learned Judge who tried the cause did not adopt that view, and I think properly. He considered that, as between the plaintiff and defendant, the value of the vessel must be taken as £3200, \* and it [\*755] appears to me that is the correct view. It may happen that when a vessel is insured for a long time or a long voyage, her value may not be the same at the beginning as at the end of the

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voyage. More freight being carried might increase her value, or she might have met with an accident and have been so thoroughly repaired that her value might be considerably increased. But, in general, the value must be taken to be that which is stated in the policy. If that is binding upon the underwriter, so that he cannot give evidence of the real value of the vessel, and so prevent the assured from recovering the amount stated in the policy, the assured is equally bound by the agreed value, and if he has received that amount he has no further claim upon any other underwriter. If he has received less he can only recover on other policies the difference. Upon these grounds I think that the rule ought to be discharged.

MARTIN, B. — I am of the same opinion. I admit that a judgment given in a matter of this kind is not altogether satisfactory, which arises from the circumstance that Courts of law view policies of insurance in one light, whilst the assured views them in a totally different light. Courts of law are obliged to discuss these questions on the principle that the sum to be recovered is an indemnity for the value of the ship, but persons who insure entertain an entirely different notion, so that we have to decide on principles at variance with those of the parties when they enter into these contracts. It is therefore scarcely possible that the decision of a Court of law can be satisfactory to them. If the practice between the shipowner and the underwriter were founded on the principle alluded to by Lord MANSFIELD in his judgment

in *Lewis v. Rucker*, 2 Burr. 1167, 1171 (p. 215, *ante*), [\*776] viz., "that \* the value is fixed in such a manner that the insured means only to have an indemnity," the matter would be plain. But that is not the mode in which shipowners and underwriters do business. I remember a case respecting a ship the owner of which, who was a witness, proved that he had effected a policy and valued the ship upon a principle which had no reference whatever to its real value. He had opened a debtor and creditor account between himself and the ship, and insured the ship for the balance owing to him. A lawyer would say that a shipowner had no right to insure on that principle, and that he ought to value the ship on the principle stated by Lord MANSFIELD, to which I have referred.

It seems to me, in this case, that the view taken by my Brother WILLES was in accordance with authority. He considered that

## No. 92.—Bruce v. Jones, 1 Hurl. &amp; Colt. 776, 777.

by the agreement between the assured and the underwriters the value of the ship was to be taken at £3200, and that the plaintiff was entitled to recover that sum in respect of the loss of the ship. He then inquired what sum of money the assured had received, leaving out of consideration how he got it, and, finding that he had received £3126 13*s.* 6*d.*, he treated it as if there had been a salvage of the ship, and the assured had received that amount after the ship was sold. He then placed that amount to the credit of the underwriter as against the £3200; and he entirely dismissed from his consideration what was stated as the value of the ship in other policies between the plaintiff and individuals to whom the defendant was a stranger. According to the best judgment I can form on the matter, that is the more correct mode of estimating the damage. It is in accordance with the view taken by Courts of law, that insurance is a contract of indemnity against the loss actually sustained. I am not insensible to the

\*observation that the amount which the assured is entitled [\*777] to recover may depend upon which policy he first puts in suit; but, in point of fact, each policy is a separate contract, and the assured must deal with each underwriter according to his particular contract.

CHANNELL, B.—I am of the same opinion. The damages were assessed under the direction of the learned Judge; and an application is made for a new trial on the ground that he misdirected the jury in stating his view as to the measure of damage. The broad question is whether the plaintiff is entitled as against the defendant to damages to a greater amount than he has recovered. If so, there would be ground for granting a new trial; but, being of opinion that the damages were rightly assessed, it is unnecessary to consider whether any other mode of assessment should be resorted to. The plaintiff has recovered from the defendant, not his proportion of the £3200, the agreed value in the policy, but his proportion of the difference between that sum and the amount which the plaintiff received on the three other policies. I think that is all the plaintiff is entitled to; and that, when the defendant is sued for his proportion upon a policy in which the ship is valued at £3200, that must be taken as the value of the ship for the purpose of his liability; and the question is how far that is lessened by the sums received on other policies. I agree that some inconvenience may result from the rule now laid down; and it is

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No. 92.—Bruce v. Jones, 1 Hurl. & Colt. 777, 778.—Notes.

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not satisfactory to find that, if the order of suing on the policies had been inverted, a different amount would have been recovered. But I think that is, in a great degree, attributable to the character of these insurances, as explained by my Brother MARTIN; and that, at all events, as the plaintiff has effected an insurance [\* 778] in which his ship is valued at £3200, we must abide by the rule of law that, for the purpose of estimating the liability of the defendant, that amount must be taken as fixed by the policy.

*Rule discharged.*

#### ENGLISH NOTES.

The cases relating to the above rule have been already fully commented on in the notes to Nos. 68-70, p. 227 *et seq.*, *ante*.

#### AMERICAN NOTES.

Parsons says on this subject (1 *Marine Insurance*, p. 266): “The American cases proceed on the American rule as to successive insurances,”—*i. e.*, “the first insurer pays his whole insurance, and the second policy is held to attach to only so much of the property or interest insured as is left uninsured by the first policy, and so on through all of them,”—“but it cannot be said that they leave it certain how far the valuation of a prior policy affects a later policy. In one case, a prior bottomry bond (which, being substantially a prior insurance for the amount of the bond, must be deducted from the insurable interest to determine how much was covered by a subsequent policy), the Court directed that it be deducted from the actual value, and not from the agreed value, thus opening the valuation to proof. *Watson v. Ins. Co. of North America*, 3 Wash. C. C. 1. This, however, has not been uniformly held, under their own valuation, to pay for the difference between that agreed value and the sum paid under the prior policy, namely, two thousand dollars; although the prior insurers had paid the whole of what in that policy was agreed to be her value. *Murray v. Ins. Co. of North America*, 2 Wash. C. C. 186. A similar conflict attends the question which arises when the prior policy is an open one, and the second policy a valued one. This question is, whether the valuation in the second policy applies to all the goods or only to so much of them as were left uninsured by the first policy. — the interest in that first policy being measured, as is usual in policies, by the invoice price. It is easy to see that if the valuation in the second policy applies to all the goods, a case might easily occur in which, after the whole interest was exhausted and completely covered by an open policy, a new insurable interest was created by the valuation for the second policy. If, for example, fifty thousand dollars were insured on cotton in an open policy, and the same sum insured on the same cotton valued at thirty cents a pound, and a total loss occurred, if the insured sue the first insurers, proving that the cotton cost him fifteen cents a pound, and that at that rate what he had on board was worth fifty thousand dollars, he would recover this whole sum from the first insurers. If then, turning to the second

No. 93.—*Newby v. Reed.*—Rule.

insurers, he proved that the cotton on board, when valued at thirty cents a pound, or twice its cost, was worth twice the former sum, or one hundred thousand dollars, and of this he had been paid only half by the first insurers, he could therefore claim of the second insurers the other half. *Plasants v. Maryland Ins. Co.*, 8 Cranch, 55; *Minturn v. Columbian Ins. Co.*, 10 Johns. 75; *Kane v. Commercial Ins. Co.*, 8 Johns. 229. This view has been held in this country, but so also has the opposite view, namely, that if the first policy is settled, as open policies are, by proof of actual value, and it is found that the insurance by that policy leaves a certain proportion of the goods uncovered, then the whole valuation attaches to this part of the goods. *McKim v. Phoenix Ins. Co.*, 2 Wash. C. C. 89; *Feise v. Aguilar*, 3 Taunt. 506; *Dumas v. Jones*, 4 Mass. 647; *Mayo v. Maine F. & M. Ins. Co.*, 12 Mass. 259.

"We do not know that there is any practice under this question sufficiently established to have the force of mercantile usage. So far as we have been able to learn how such cases are adjusted, we should say that the prevalent view was that the insured, in making his second policy, intended to cover by his valuation an interest in the whole property which should be measured by a valuation of the whole, and where the valuation is applied to a thing not separable into portions, as a ship, we can see no sufficient reason for confining this valuation in the second policy merely to the surplus of proved value left uncovered by the prior policy."

The statement of the Rule is adopted in 14 Am. & Eng. Enc. of Law, p. 339, as to recovery upon a valued policy where there is prior insurance; citing *Craig v. Murgatroyd*, 4 Yeates (Penn.), 161; the principal case; and *Kenny v. Clarkson*, 1 Johnson (N. Y.), 385.

But in *Kenny v. Union M. Ins. Co.*, 1 Russell & Geldert (Nova Scotia), a case of insurance on a vessel valued at \$16,000, no recovery was allowed, because that sum had already been received from prior insurance, and no inquiry into the true value was permitted.

No. 93.—*NEWBY v. REED.*

(1762.)

## RULE.

IN case of a double insurance the insured may recover the whole against any of the insurers, and leave him to recover a rateable satisfaction from the others.

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No. 93.—*Newby v. Reed*, 1 W. Bl. 416.—Notes.

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**Newby v. Reed.**

1 Wm. Bl. 416.

*Double Insurance. — Right of Action of Insured. — Subrogation of Insurers.*

[416] It was ruled by Lord MANSFIELD, Ch. J., and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers.

## ENGLISH NOTES.

A note of the two following cases is subjoined to the original report:—

Where the plaintiff had insured at Liverpool on a voyage from Newfoundland to Barbadoes and the Leeward Islands, with an exception of American captures, and afterwards insured at London on the same ship from Newfoundland to Dominica, and from thence to the port of discharge in the West Indies, without that exception, he had a verdict against a London underwriter for his full demand, with liberty to the defendant to bring an action against the Liverpool underwriters if he thought fit. *Rogers v. Davis*, Park's Ins. 423 (ed. 1817). Accordingly this defendant brought an action for money had and received, in order to recover a contribution for the loss, which he had been obliged to pay, and got a verdict. Lord MANSFIELD: “The question seems to be whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two securities, where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a re-assurance. But a re-assurance is a contract made by the insurer to secure himself, and this is only a double insurance.” *Doris v. Gildart*, id. 424. See *Godin v. London Assurance Co.*, 1 Wm. Bl. 103.

Wharfingers who by the custom of the particular trade were liable as insurers of grain stored with them effected an insurance with the North British and Mercantile Insurance Company, containing a condition that if there was another insurance of the same property the company should only be liable *pro rata*. Certain merchants, customers of the wharfingers, had effected an insurance with the London, Liverpool, and Globe Company, on grain of theirs in the premises of the wharfingers. The grain having been destroyed by fire, the question how the liabilities were to be worked out as between the two insurance companies came to be decided in the action, *North British and Mercantile Insurance Co. v.*

No. 93.—*Newby v. Reed.*—Notes.

*London, Liverpool, and Globe Insurance Co.* (C. A. 1877), 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. 629. The Court of Appeal, affirming the decision of the MASTER OF THE ROLLS, held that as between the two companies the latter company were not liable to contribute. For, as between the merchants and the wharfingers, the wharfingers were primarily liable, and if the merchants had recovered from the London, Liverpool, and Globe Insurance Company, that company would have been entitled to the benefit of the merchants' indemnity against the wharfingers, for which the North British and Mercantile Insurance Company were liable. And the condition as to double insurance could only apply to an insurance of the same interest.

In *Darrell v. Tibbetts* (C. A. 1880), 5 Q. B. D. 560, 50 L. J. Q. B. 33, 42 L. T. 797, 29 W. R. 66, A. had demised premises to B. by a lease containing a covenant by B. to repair in case of injury by gas. There was also a covenant by A. to insure against fire, and a stipulation that in case the premises were destroyed by fire the sum recovered from the insurance company should be applied in repairing them. A. insured accordingly against fire, — explosion by gas being one of the risks insured against. Under the policy the insurers had the option, instead of paying the compensation, to reinstate the premises. The premises were injured by an explosion by gas, and the insurance company, without an action being brought against them, paid the claim for damage. Subsequently A. brought an action against B. on the covenant, and B. reinstated the premises. The insurance company then brought an action against A. for repayment of the money which they had paid. The Court held that they were entitled to recover. It was held to be established on the authority of the *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.* (*supra*), that a policy of fire insurance is like one of marine insurance, a contract of indemnity; and also that the insurer was in the position of a surety so as on payment to be subrogated to the rights of the insured. So that on payment the insurance company became entitled to stand in the place of A. to sue B. on his covenant. But inasmuch as A. himself sued B. and in effect recovered satisfaction, he was bound to make over to the insurer the benefit of the satisfaction recovered, or, in other words, to repay the insurer the amount which was paid as an equivalent for that satisfaction. The same principle was again applied in the *West of England Fire Insurance Co. v. Isaacs* (C. A. 1896), 1897, 1 Q. B. 226, 66 L. J. Q. B. 36, 75 L. T. 564, where it was further decided, as a consequence of the principle, that if the insured, after payment by the insurer, compromises or discharges his right against the person primarily liable, he must himself repay the insurer the amount which the latter would have been entitled to recover in his name.

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No. 93.—*Newby v. Reed.* — Notes.

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## AMERICAN NOTES.

The doctrine of the principal case prevails in this country, in the absence of special contract upon the subject. *Thurston v. Koch*, 4 Dallas (U. S. Circ Ct.), 348, citing the principal case; *Cromie v. Kentucky, &c. Ins. Co.*, 15 B. Monroe (Kentucky), 432; *Millawlon v. Western M. & F. Ins. Co.*, 9 Louisiana, 27; 29 Am. Dec. 433; *Wiggin v. Suffolk Ins. Co.*, 18 Pickering (Mass.), 145 (SHAW, Ch. J.); 29 Am. Dec. 576; *American Ins. Co. v. Griswold*, 14 Wendell (N. Y.), 399, 461; *Craig v. Murgatroyd*, 4 Yeates (Penn.), 161; *Bank of B. N. A. v. Western Ass. Co.*, 9 Ontario, 166.

The American policies, however, generally provide that the subsequent underwriters shall be liable only to the extent not covered by prior policies, and not liable for contribution.

Parsons cites this case (1 Marine Insurance, 289, &c.). It is also cited in a note, 29 Am. Dec. 121, where the point is intelligently discussed.

In *Wiggin v. Suffolk Ins. Co., supra*, SHAW, Ch. J., observed: "The party holding such double assurance may in the outset, and before making any election, consider each debtor as liable to bear a proportionate part of the common burden, and recover accordingly; or he may require either of the parties liable to pay the whole; and then it follows as a rule of law, founded upon the broadest principles of equity, that where one of two parties has paid the whole of a debt for which each was originally and ultimately liable, the party who has paid the whole or a disproportionate part of the common debt, shall have a remedy against the other for a contribution, so that the burden may be borne equally according to their respective liabilities."

In *American Ins. Co. v. Griswold*, SAVAGE, Ch. J., in the Supreme Court gave a valuable review of the English doctrine, from *African Company v. Bull* to the principal case and others, and all the American cases up to that time, and observed: "It will be seen that the Courts have uniformly understood the object of the prior policy clause to be to restore the rights of the parties to what they were before Lord MANSFIELD introduced the law of contribution." On this appeal to the Court of Errors that judgment was affirmed; the CHANCELLOR cited the principal case, and it was also cited and examined by Senator TRACY in a learned dissenting opinion. The CHANCELLOR said: "By the continental law of Europe, and by the English law of insurance as it existed previous to the decision of Lord MANSFIELD in *Newby v. Reed*, 1 W. Black. R. 413, if there were several policies of different dates upon the same subject, and the amount of insurable interest was insufficient to cover the whole amount insured in both policies, so as to constitute a case of double insurance, the second policy only attached upon or covered so much of the insurable interest as was not covered by the first policy; and the second underwriter was only entitled to retain the premium *pro tanto*, where the commencement and termination of the risk and the perils insured against were the same. 3 Kent's Com. 281; Vanderlinden's Com. 655, b. 4, ch. 16, § 7; Miller on Ins. 266. By this ancient English rule and the continental law the second underwriter was, as he always ought to be, merely substituted in the place of the assured, as to the uninsured interest of the latter which was not covered by the first

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policy; so that the rule of apportionment between the first and second sets of insurers, where both policies when taken together were sufficient to cover the whole insurable interest, was precisely the same as it would have been between the underwriters in the first policy and the assured, if the second insurance had not been made. If the object of the American clause was to restore this ancient rule of apportionment between the underwriters in successive policies, as it originally existed in the mercantile law of England as well as the rest of Europe, it is hardly possible to do it in more appropriate and explicit language than is used in the last paragraph of this clause."

Senator TRACY's opinion, in the last case, that the American clause applied only in cases of double insurance, was adopted in *Whiting v. Independent M. Ins. Co.*, 15 Maryland, 297, citing the principal case. Mr. Parsons reviews this matter very elaborately.

SECTION XII.—*Return of Premium.*No. 94.—*TYRIE v. FLETCHER.*

(1777.)

No. 95.—*BERMON v. WOODBRIDGE.*

(1781.)

No. 96.—*LONG v. ALLAN.*

(1785.)

## RULE.

IF the risk has never been entered on, the premium must be returned. But if the risk has once been entered on, although it has been determined before the contemplated period, then—assuming the contract to be entire and indivisible—no part of the premium is repayable.

The contract is construed as indivisible where it is made for an entire premium, and no part of the voyage is expressed to be insured upon a contingency which does not apply to the rest.

But where part of the voyage is insured subject to an express warranty, which imports a contingency,—as where the voyage is from A. to B., and thence with convoy to C.,

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No. 94.—**Tyrie v. Fletcher, 2 Cowper, 666.**

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—then evidence of a usage may be admitted to show that the premium is apportionable and the contract divisible.

**Tyrie v. Fletcher.**

2 Cowper, 666-671.

*Insurance.—Entire Risk.—Commencement of Voyage.—No Return of Premium.*

[666] Upon a policy "at and from such a port to any other port or place whatsoever for twelve months, at £9 per cent, warranted free from capture," the risk is entire; and therefore, if once begun, there shall be no return of premium.

This was an action on the case for money had and received to the plaintiff's use, brought by the plaintiff, the insured in a policy of insurance, against the defendant, the underwriter, for a return of part of the premium. The cause was tried before Lord MANSFIELD, at Guildhall, at the sittings after last Trinity Term, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the Court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned, or not? If the Court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered. It now came before the Court upon a rule to show cause why a nonsuit should not be entered, and the case, as it appeared from the report, was shortly this: "The policy of insurance was upon the ship *Isabella*, at and from London to any port or place, where or whatsoever, for twelve months, from the 19th of August, 1776, to the 19th of August, 1777, both days inclusive, at £9 per cent, warranted free from captures and seizures by the Americans, and the consequences thereof." In all other respects it was in the common form, against all perils of the sea, &c. The ship sailed from the port of London, and was taken by an American privateer about two months afterwards.

Mr. Dunning and Mr. Davenport, for the plaintiff, showed cause, and insisted that a proportionable part of the premium in this case ought to be returned; that £9, the compensation estimated for the risk of twelve months, was much more than adequate to the risk actually run in this case, viz., only two months. That from the nature of the insurance both parties must know the risk was divisible; and of course intend, if it ceased before

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the twelve months, that the whole of the premium should not be retained. That this was the law in other cases, where, upon a suitable compensation for a given risk, the risk had turned out to be different from what was expected. In *Stevenson v. Snow*, 3 Burr. 1237, the risk ceased before the end of the voyage insured, and it was there held there should be a return of premium in proportion to the risk that had not been run. It is true, that was a policy upon a voyage, but it is as easy, or easier, to apportion the risk in a policy upon time, \*as it is in a [\* 667] policy upon distance. In the case of *Bond v. Nutt*, Trin.

17 Geo. III. B. R., which was a policy "at and from Jamaica to London," the underwriters paid into Court a part of the premium, in proportion to that part of the voyage from which they held themselves discharged. This case is not like the case of an insurance upon lives, to which it was compared at the trial, because that is in the nature *cūl* a wager. But this is, in the true spirit and use of an insurance, an indemnity against a loss. That loss, according to the terms of the policy, might accrue later, or earlier, or not at all; but in the case that has happened, namely, a capture by an American privateer, the risk of any such loss as that insured against must totally cease. The construction, therefore, of the policy, under these circumstances, ought to be that it was an insurance for twelve months, at the rate of so much per month: and as the risk, in fact, was only run for two months, the premium advanced upon the other ten ought to be returned.

Mr. Wallace and Mr. Baldwin, *contra*, for the defendant, and in support of the rule, contended, that as soon as the ship sailed from the port of London the policy attached for the whole time insured against; that there was no calculation of the premium at so much per month, but it was one entire gross sum of £9 per cent, stipulated and paid for twelve months. The contract, therefore, was entire, without any intention or thought of division or apportionment. That the case of *Stevenson v. Snow* did not at all apply; for there the Court went upon the ground of its being a policy upon two distinct voyages, separately and distinctly in the contemplation of the parties at the time, and the premium calculated accordingly. Of course, if either of the voyages were prevented from taking place, the risk upon it could not attach; and therefore the premium ought to be returned. Upon the principles laid down on the other side, every policy for time might be

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divided. Suppose an insurance for a month, would the plaintiff have been entitled to restitution for a number of days? It is absurd; and there would be no drawing the line. If there had been a recapture, the policy would have revived. The fault of the party is not the true ground upon which a return of premium is or is not allowed; but it rests upon this: Whether the risk, or the voyage insured, has begun? If it has, there can be no return of premium. 2 Magens, 267, No. 1071. There are many cases

where, notwithstanding the fault of the party, a return of [\* 668] premium is allowed. \* For instance, if a ship is insured at and from such a port to such a port, and the party goes on another voyage, the premium must be returned; because the risk never commenced. So if he is to sail with convoy, and stays behind. But with respect to the present case, it is not distinguishable from an insurance upon a life for a year, with an exception of suicide, where the party destroys himself within a month. No one ever thought of requiring a return of premium in that case, because the risk is entire. So here it is one entire, indivisible risk, which being once begun, there can be no return of premium. And, consequently, the plaintiff is not entitled to recover.

Lord MANSFIELD. — It was very proper to save this case for the opinion of the Court, because in all mercantile transactions certainty is of much more consequence than which way the point is decided: and more especially so in the case of policies of insurance, because, if the parties do not choose to contract according to the established rule, they are at liberty as between themselves to vary it. This case is stripped of every authority. There is no case or practice in point, and therefore we must argue from the general principles app'icable to all policies of insurance. And I take it there are two general rules established applicable to this question. The first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it. 2. Another rule is, that if that risk of the contract of indemnity has once commenced, there shall be no

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apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage as it is for the time. If a ship had been insured to the East Indies agreeably to the terms of the policy in this case, and had been taken twenty-four hours after the risk was begun, by an American captor, there is not a colour to say that there should have \* been a return of premium. So much, then, [\* 669] is clear, and, indeed, perfectly agreeable to the ground of determination in the case of *Sterenson v. Snow*. For in that case the intention of the parties, the nature of the contract, and the consequences of it spoke manifestly two insurances, and a division between them. The first object of the insurance was from London to Halifax. But if the ship did not depart from Portsmouth with convoy (particularly naming the ship appointed to be convoy), then there was to be no contract from Portsmouth to Halifax: why, then, the parties have said, “We make a contract from London to Halifax, but on a certain contingency it shall only be a contract from London to Portsmouth.” That contingency not happening, reduced it, in fact, to a contract from London to Portsmouth only. The whole argument turned upon that distinction. Mr. Yates, who was for the plaintiff, put it strongly upon that head; and all the Judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being, in fact, two voyages: and it was the equitable way of considering it; for though it was at first consolidated by the parties, there was a defeasance afterwards, though not in words. I think Mr. Justice WILMOT put it particularly upon that ground, but it was the opinion of the whole Court. There was a usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such like cases, but they could not say what part. The Court rejected this as a usage for the uncertainty; but they argue from it, that there being such a custom, plainly showed the general sense of merchants as to the propriety of returning a part of the premium in such cases; and there can be no doubt of the reasonableness of the thing. There has been an instance put of

No. 94.—*Tyrie v. Fletcher*, 2 Cowper, 669, 670.

a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is, an insurance upon a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it; for the underwriter would demand double the premium for two years that he would take to insure the same life for one year only: in such policies there is a general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned. A case of general

practice was put by Mr. Dunning, where the words of [\* 670] \* the policy are, "At and from, provided the ship shall sail on or before the 1st of August;" and Mr. Wallace considers in that case that the whole policy would depend upon the ship sailing before the stated day. I do not think so; on the contrary, I think, with Mr. Dunning, that cannot be. A loss in port before the day appointed for the ship's departure can never be coupled with a contingency after the day; but if a question were to arise about it, as at present advised, I should incline to be of opinion that it would fall within the reasoning of the determination in *Sterenson v. Snow*; and that there were two parts or contracts of insurance, with distinct conditions. The first is, I insure the ship in port, provided she is lost in port before the 1st of August; and 2ndly, if she is not lost in port, I insure her then during her voyage from the 1st of August, till she reaches the port specified in the policy. The loss in port must happen before the risk upon the voyage could commence; and, *vice versa*, the risk in port must cease the moment the risk upon the voyage began. Let us see then what the agreement of the parties is in the present case. They might have insured from two months to two months, or in any less or greater proportion, if they had thought proper so to do; but the fact is that they have made no division of time at all; but the contract entered into is one entire contract from the 19th August, 1776, to the 19th August, 1777; which is the same as if it had been expressly said by the insured, "If you, the underwriter, will insure me for twelve months, I will give you an entire sum; but I will not have any apportionment." The ship sails, and the underwriter runs the risk for two months. No part of the premium then shall be returned, — I cannot say, if

No. 95.—*Bermon v. Woodbridge*, 2 Doug. 781.

there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

ASTON, J.—This case depends upon the words of the policy; and I am of opinion it is one entire contract at a certain gross sum of £9 per cent for a certain period of time, viz. twelve months, and that no division is to be implied. The determination in *Stevenson v. Snow* went expressly upon this consideration, that there were two distinct voyages, and no consideration received by the insured for the premium upon the second voyage; and there certainly was not, for there never was any point of time when any risk was run from Portsmouth. In *Bond v. Nutt* the losses insured against were distinct, and unconnected with each other. 1st. A loss of the ship in port, if \*any should [\*671] happen there. 2ndly. A loss in her passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance upon a life, the sum is lumped, and the time is lumped for the year. So in this case I think the contract is one entire contract, and, therefore, that there ought to be no return of premium.

Mr. Justice WILLES and Mr. Justice ASHHURST were of the same opinion.

PER CUR.

*Let a nonsuit be entered.*

•      **Bermon v. Woodbridge.**

2 Doug. 781-790.

*Insurance. — Voyage. — Entire Contract.*

An insurance on a ship and goods—at and from A. to B., during her [781] stay and trade there, at and from thence to her port or ports of discharge in C., and at and from thence back to A.—is an entire contract, and, if the loss happen at any time after the commencement of the risk, there shall be no return of premium.

On the first day of this term Lee obtained a rule to show cause why there should not be a new trial in this cause, which had come on before Lord MANSFIELD, at Guildhall, at the sittings after last Easter Term, when the jury found a verdict for the defendant.

The case was this: It was an action on a policy of insurance on the French ship *Le Pactole* and her cargo, and the voyage was described in the policy in the following words: "At and from

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Honfleur, to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur." The clause respecting the premium was as follows: "Slaves valued at 800 liv. tournois per head; the ship at £1450 sterling; other goods, &c., as interest may appear; at a premium of £11 per cent." The ship sailed to Angola, and from thence, after staying some time there, to the West Indies. On her way from Angola she put in at Cayenne, on the coast of America, and from Cayenne went to

Martinico, confessedly out of the course to St. Domingo.  
[782] The only witness called by the counsel for the plaintiff

was the captain. He swore that in pursuing the direct course from Angola to St. Domingo he must have passed close to Cayenne, but that his putting in there was unpremeditated, and from necessity: that his bowsprit was broken on the passage from Angola towards that place by the violence of the weather: his provisions, too, had run short, although he had been originally fully victualled, owing to an unusual and unexpected delay in watering on the coast of Angola, and because his voyage towards Cayenne had been protracted by the accident which had happened to his bowsprit: that the loss of time in watering arose from his being deprived of the assistance of the crews of the English vessels, an accommodation which is constantly given in time of peace, and which it had not been foreseen that he would be deprived of, as the hostilities between the two nations had not taken place till after his departure from France: that, when he left Angola, he thought he had sufficient provisions for the St. Domingo voyage; for, notwithstanding the delay there, he had enough to last six weeks, which was more than the usual length of that voyage, though it sometimes lasts three months: that some of his water-casks were staved on the way from Angola: that, when he left Angola, he did not mean to put in anywhere between that and St. Domingo: that, when he was at Cayenne, he found it necessary to proceed from thence to Martinico, in order to get a supply of provisions there, and that he might avoid the English privateers, which were very numerous in the course of the direct passage to St. Domingo: that he meant to have pursued his voyage from Martinico to St. Domingo, in order to take in his homeward-bound cargo of sugars there, according to his original destination; but that, after he had been there a few days, an embargo was laid on, and con-

## No. 95. — Bermon v. Woodbridge, 2 Doug. 782. 783.

tinued for seven months, so that it became necessary for him to part with his cargo of negroes at that island (which he did for a price of £3000 sterling under what they would have fetched at St. Domingo), and that he was obliged to take sugars in payment, no money or good bills being to be had: that, after the embargo was taken off, he sailed with the convoy for St. Domingo, but not to St. Louis, his intended port of discharge, but to Cape François, a port in another part of the island, such being the general orders for the convoy: that at the end of four days, his ship being a slow sailer, he lost sight of the convoy, but still per- [783] sisted, for some time, in sailing toward Cape François; till his officers represented to him, in the most urgent manner, the danger of pursuing that course any further, on account of the swarms of privateers which would unavoidably fill those seas, as soon as it should be known that the convoy was gone by: that, on these representations, he determined to alter his course, and strike into the direct way to Honfleur, which he accordingly did, and was sailing towards that port when he was taken. To corroborate the testimony of the captain, besides reading his protest, which was to the same effect with his evidence, a certificate from the directors of the colony of Cayenne and French Guiana was offered to be produced, stating the motives which had induced him to put into that port. Lord MANSFIELD was clear that this was not admissible evidence for the plaintiff; but, having desired to look at it, and having himself read it, he said, as it had been offered on the part of the plaintiff, it might be read as evidence against him, and it was accordingly read, and was in these words: "We attest that the said captain touched here for want of water, and that it was not possible for him to find, in this colony, provisions to be purchased, of which he was much in want." This certificate, which must be taken to have been founded on the captain's own account at Cayenne, his Lordship thought inconsistent with his evidence, because it made no mention whatever of his bowsprit having been broken. The defendant called no witnesses; and Lord MANSFIELD left it to the jury to consider whether the deviation in the voyage from Angola to St. Domingo, by putting into Cayenne and going to Martinico, was wilful or necessary. They were clearly of opinion that it was not necessary. Upon their declaring that opinion, as there was a count in the declaration for money had and received, the counsel for the plaintiff con-

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tended that the voyage insured ought to be considered as composed of three distinct parts or voyages; viz.: 1. From Honfleur to Angola; 2. From Angola to St. Domingo; 3. From St. Domingo to Honfleur; and that, as the voyage from St. Domingo to Honfleur had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from St. Domingo to Honfleur. Lord MANSFIELD took the opinion of the jury also upon that point, and they were clear

there ought to be no return. Next day, however, his [784] Lordship said he had turned that question in his mind,

and entertained some doubts upon it, and, as it was a question of law, desired Lee to move for a new trial upon that ground. The motion was made on both grounds, viz.: 1. On the question of fact, whether the deviation was wilful; 2. On the question of law, whether, supposing it wilful, there ought to be a return of premium.

On Saturday, the 30th of June, the case was argued by Lee, Howorth, and Douglas, for the plaintiff; and the Attorney-General, Dunning, and Bower, for the defendant. In support of the verdict it was insisted: 1. On the first point, that the certificate produced entirely discredited the captain, and that it was manifest he must have sailed from Angola with the intent of going to try the market at Martinico; for it could not be believed that he had set sail on a voyage which might last, according to his own account, for three months, with provisions only for six weeks. That this was a mere question of fact and credit, and properly left to the jury, and their judgment upon it ought to be conclusive. 2. On the second point, it was contended that the description in the policy was of one entire voyage and one entire risk, and that, in such cases, no return is ever to be made after the risk has once commenced. That this had been decided in a variety of cases, but particularly in *Tyrie v. Fletcher*, 2 Cowp. 666 (p. 502, *ante*), and *Lorraine v. Tomlinson*, 2 Doug. 585. In *Tyrie v. Fletcher* the policy was upon the ship the *Isabella*, "at and from London to any port or place, where or whatsoever, for twelve months, from the 19th of August, 1776, to the 19th of August, 1777, both days included, valued at £1000, for account of A. B., the master, and others that may be concerned with him, at £9 per cent, warranted free from captures and seizures by the Americans, and the consequences of any attempts thereof." The ship was

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taken by an American privateer on the 13th of October, 1776, and the plaintiff brought his action for a return of premium, in the proportion of ten-twelfths of the whole, the risk having ceased before the expiration of the second of the twelve months. The cause was tried before Lord MANSFIELD, at Guildhall, and a verdict found, by consent, for the plaintiff, in order to take the opinion of the Court, whether there ought to be an apportionment and return of premium; if there ought not, a nonsuit to be entered. The case was solemnly argued, and the [785] cases of *Stevenson v. Snow*, 3 Burr. 1237, 1 Black. 315, 318, and *Bond v. Nutt*, 2 Doug. 367, relied on by the counsel for the plaintiff. But the Court were clearly of opinion that there ought to be no return; that the case was similar to an insurance upon a life for a year, with an exception of death by suicide, where, if the life insured is put an end to by suicide within the year, there never is any return of premium; that the contract was entire, and when so, whether for a specified time or for a voyage, there shall be no apportionment nor return, if the risk has once commenced; and that the opinion of the Court, in *Stevenson v. Snow* and *Bond v. Nutt*, went upon there being two distinct risks,<sup>1</sup> which there certainly were in those cases, but not in this. In the present case, if the parties had chosen to do so, they might have made three insurances in one policy, by dividing the voyage into three distinct parts and risks. There is no long voyage where that may not be done. But this contract is not so. It is on a voyage from Honfleur back to the same port, by Angola and St. Domingo. Many of the policies on our East India voyages run in the same way, and there is never any return of premium on them, in whatever part of the voyage the loss happens. The difficulty of apportioning the premium is insurmountable. The risk varies every day and hour in time of war, and it is impossible to ascertain how much shall be appropriated to each different part. The premium is mentioned in the gross—£11 per cent—on the whole voyage, not in separate distinct sums for different parts of it. Dunning said he had advised the action in the case

<sup>1</sup> In *Bond v. Nutt* the reasoning of the Court went upon there being a divisible risk, or two risks united in the same policy; but I believe no question was agitated in Court about a return of premium;

for the defendant in that case had tendered the whole premium, and it was taken out of Court by the plaintiff before the trial.

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of *Tyrie v. Fletcher*, having then an idea that *Stevenson v. Snow* had been decided on the broad ground that there should be a return in all cases where the risk could be ascertained to have ceased before the end of the voyage insured; but that on the argument of *Tyrie v. Fletcher* it came out clearly that the judgment in *Stevenson v. Snow* had gone upon the ground of there being two voyages.

For the plaintiff, it was contended, 1. That the certificate produced was not at all inconsistent or incompatible with the captain's evidence. It did not follow, because the reason of want of water was there stated for his putting into Cayenne, that he had not also other reasons for adopting that measure. The captain alone was examined. He spoke to facts and motives within his own knowledge; and the jury could not disbelieve him, without imputing perjury to him, which they had no right to do in a case where there was no incongruity in his evidence, and he was not contradicted nor his credit impeached by any other witness. The verdict was founded in part upon his evidence; for, as he was the only witness on either side, the fact of the supposed deviation could only be gathered from what he swore; and if one part of his testimony was to be adopted, the whole ought. If an affidavit or an answer in Chancery is read in evidence it cannot be mutilated, and part received and part rejected; but the whole must be taken together. 2. As to the return of premium, it is certainly most reasonable that there should be nothing paid for that part of a voyage in which no risk is run by the underwriter. This seems to follow from the very nature of a contract of mere indemnity, which a policy of insurance is; and in *Stevenson v. Snow* the determination went upon that general principle, not merely on there being two voyages. The cases of *Tyrie v. Fletcher* and *Lorraine v. Tomlinson* were upon time; and in such cases the reason why there shall be no return is that, from the nature of the thing, it is impossible to ascertain the degree of risk in the different portions of the time insured. But where the insurance is upon a voyage consisting of different parts, from port to port, there is nothing so easy, because the respective premiums for the voyage between all the different ports mentioned in the policy are always known and settled. If there were anything in the supposed difficulty of apportioning the premium in time of war, it ought to be considered that the war

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had not commenced when this contract was entered into. But, if it were necessary for the plaintiff to show that by the very words of the policy there were three different voyages insured, surely they are as distinctly marked out here as the two were in *Stevenson v. Snow*. The words "at and from" are repeated three times, which would have been unnecessary if one entire voyage and one entire contract had been in contemplation. In short, the form of expression here is fully as descriptive of several successive voyages as the words of the policy were in *Stevenson v. Snow*, and, indeed, much more so, if they were as stated in Mr. Justice BLACKSTONE's report of the case; for, according to [787] him, the words of that policy run, "Warranted to depart with convoy for the voyage" (1 Black. 315), not as stated by Sir JAMES BURROW, "Warranted to depart with convoy from Portsmouth for the voyage" (3 Burr. 1237). In all cases where there is an insurance on an outward-bound voyage, and also on the homeward-bound voyage from the ultimate port at which the homeward-bound cargo is to be taken in, though in the same policy, the division into two voyages and two risks is obvious and natural; insomuch that, by the French ordinance of 1681, which is, in some measure, a digest of the general law of merchants relative to maritime causes, it is expressly provided that a fixed proportion of the premium shall be returned if the homeward-bound voyage never commence. "Si l'assurance est faite sur marchandises pour l'aller & le retour, et que le vaisseau, étant au lieu de sa destination, il ne se fasse point de retour, l'assureur sera tenu de rendre le tiers de la prime, s'il n'y a stipulation contraire." Ordonn. de la Mar. 1681, art. 6. There, too, the words are "assurance pour l'aller & le retour," are much less expressive of a divisible risk than those used in the present policy. Lee mentioned a case of *Scott and others v. Rae*, tried before Lord MANSFIELD, at Guildhall, as directly in point. The insurance there was, "at and from Grenada to Boston, in New England, and from thence back to Grenada and London." The ship sailed from Grenada to Boston, and from thence to Goldsborough, in New England, and from Goldsborough directly to London, and Lord MANSFIELD held that the contract was capable of being severed, that there ought to be a return of premium proportioned to the risk from Goldsborough back to Grenada, and from thence to London, and that this proportion might be ascertained, and had been

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proved by a witness to amount to £3 per cent.<sup>1</sup> Howorth [788] stated that in the case of *Lacabre v. Walter*, 2 Doug. 284,

the underwriters were so well satisfied that the risk might be apportioned, that they had voluntarily made a return of premium.

Lord MANSFIELD said the reason why he had desired the motion to be made on the point concerning the return of premium, and why he should now direct that the case should stand over till the Court should consider of their opinion, was that, in all mercantile transactions, it is infinitely more important that the law should be certain and uniform, than that, at first, it should be one way or the other.

This day his Lordship delivered the opinion of the Court to the following effect:—

Lord MANSFIELD.—The motion for a new trial in this case is made upon two grounds: 1. That the verdict is against evidence; 2. That there ought to be a return of premium for the voyage from St. Domingo to Honfleur. 1. There was but one witness examined,—the captain,—and he did give evidence that he was forced to go into Cayenne and Martinico on account of the breaking of his bowsprit and the deficiency of provisions, and averred that the whole was occasioned by inevitable necessity. If this was true, there was no deviation in point of law; but there were many suspicious circumstances in his evidence; and the jury expressly found, on the specific question being put to them, that his going out of the direct course was wilful, not necessary. They thought that when he sailed from Angola he did not intend to go to St. Domingo, but meant to try the Martinico market. It is said that as the case rests entirely on his evidence, you must take it altogether, and believe the whole; but though the whole of an affidavit or answer must be read, if any part is, yet you need not believe all equally. You may believe what makes against his point who swears, without believing what makes for it. It was an extraordinary circumstance that the ship should

<sup>1</sup> Nobody at the Bar recollects this case. Lee cited what Lord MANSFIELD said, from a note taken on the back of the brief at Guildhall, by Mr. Thoresby, who was attorney for one of the parties, and who has favoured me with the perusal of the brief, from which it appears that there was a warranty in the policy that the ship should depart from Grenada for

London on or before the 1st of August, 1772; so that, according to the original contract, and independent of the agreements mentioned, *infra*, p. 516, there were two risks, viz., one absolute, from Grenada to Boston and back to Grenada, and another conditional, viz., from Grenada to London, in like manner as in the case of *Bond v. Nutt*.

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be so soon in want of water, and a very suspicious one that she should fall short of provisions. How came the captain to set out on such a voyage so scantily provided? Then, there was a piece of evidence which, though not admissible for the plaintiff, was very strong against him. That was the certificate which was obtained out of the regular course of business, and manifestly intended to be a justification; and yet mentions nothing of the loss of the bowsprit, which the captain stated, on his examination, as his principal reason for going to Cayenne. There are also other strong circumstances. But, if this point was [789] doubtful, who but the jury were to decide upon it? No new evidence is pretended. It is not pretended that the plaintiff has any of the crew to produce, to explain or corroborate the captain's testimony. If we were to grant a new trial, on the ground of the verdict being against evidence, it would be sending the cause back to a jury, with an intimation that they ought to believe the captain. We are all, therefore, against granting a new trial on this ground. 2. If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated), we are now all clearly of opinion that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks? for, by splitting the words, and taking "at" and "from" separately, it will make six; viz. 1. At Honfleur; 2. From Honfleur to Angola; 3. At Angola, &c. The principles are clear. Where the risk has never begun there must be a return of premium; and if the voyages in this case are distinct, the risk from St. Domingo to Honfleur never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exceptions of suicide and the hands of justice, if the party commit suicide or is executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured is once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division: it is estimated, on the whole, at 11 per cent. And, which is extremely material, there is nowhere any contingency,

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at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the insurance. The argument must be, that, if the ship had been taken between Honfleur and Angola, there must have been a return. By an implied warranty, every ship must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was seaworthy when she left Honfleur, the underwriters would have been liable though she had not been so at Angola, &c.; but, according to the construction contended for on the part of the plaintiff, she must have been seaworthy, not only at her [790] departure from Honfleur, but also when she sailed from

Angola and when she sailed from St. Domingo. The cases of *Stevenson v. Snow* and *Bond v. Nutt* were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow* it depended on the contingency of the ship sailing with convoy from Portsmouth, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond v. Nutt* it was held that there were two risks upon the same principle. "At Jamaica" was one. The other, viz. the risk "from Jamaica," depended on the contingency of the ship having sailed on or before the first of August. That was a condition precedent to the insurance on the voyage from Jamaica to London. The two cases of *Tyrie v. Fletcher* and *Lorraine v. Tomlinson* are very strong, for, if you could apportion the premium in any case, it would be in insurances on time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium.

*The rule discharged.*

After Lord MANSFIELD had delivered the opinion of the Court, as above, he said he had forgot to mention the case of *Scott v. Rue*; that he had no recollection of it, but that it appeared from the brief, which Lee had brought into Court, that there had been a new agreement with the underwriters, that the ship might go to Goldsborough: that he must have looked upon that as a new voyage. Lee took notice that there were two agreements: one, that the ship should load at Goldsborough, to which the defendant had acceded; another, that she should come directly from that port to

No. 96.—*Long v. Allan, 4 Dougl. 276, 277.*

London without returning to Grenada, to which the defendant had not acceded; but Lord MANSFIELD said, the first agreement was sufficient to support the determination.

**Long v. Allan.**

4 Dougl. 276-278.

*Insurance.—Warranty.—Return of Premium.*

In an action on a policy of a ship warranted to depart with convoy, if [276] the ship sails without convoy, the assured is entitled to recover the premium. A usage in such case to return the premium, deducting a half per cent, is good.

This was an action against an underwriter on a policy of insurance. The first count in the declaration stated that the plaintiffs had made an insurance on the 24th of August, \*1782, upon goods on board a ship called the *Jamaicu*, [\*277] "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August;" that the defendant underwrote £400 on that policy at that premium: that on the 31st of July, 1782, the ship sailed from Jamaica for London, but without any convoy for the voyage, whereby the policy became void; by reason whereof the defendant became liable to pay to the plaintiffs £50 8s., being the premium he received for the said insurance. There were other counts for money paid and money had and received. The defendant pleaded *non assumpsit*.

The trial of the cause came on before the EARL OF MANSFIELD, at Guildhall, at the sittings after last term, when a verdict was found for the plaintiffs with £48 8s. damages, subject to the opinion of the Court on a case which stated that the defendant underwrote the policy as stated in the declaration; that the ship sailed from Jamaica for London without convoy on the 31st of July, 1782; and that the jury found the constant usage to be that in insurances at and from Jamaica to London, warranted to depart with convoy, or to sail on or before the 1st of August, where the ship does not depart with convoy, or sails after the 1st of August, to return the premium, deducting a half per cent.

Baldwin for the plaintiff.—This is a stronger case than any that has yet been determined. Here the jury have found that it has been customary to return the premium, deducting a part. The reason of the case also is strong in favour of the plaintiffs. *Sterc.*

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Nos. 94-96. — *Tyrie v. Fletcher; Bermon v. Woodbridge; Long v. Allan.* — Notes.

*son v. Snow*, 3 Burr. 1237, 1 Black. 315, 318, is in point, and there no usage was found.<sup>1</sup> When the party runs no risk he ought not, in conscience, to retain the premium. *Bond v. Nutt*, Cowp. 601, 1 Dougl. 367 (*n*). See Park Ins. 530, 6th ed.

Grant, *contra*.—This is a question on the construction of the policy, and no usage should have been gone into. *Lorraine v. Tomlinson*, 2 Dougl. 585. The only question is, whether

[\*278] \* this is an entire risk or two different risks. If the usage were to govern, there might be two different determinations on two policies containing exactly the same words. The insurer takes the combined risk,—the dangerous and the less dangerous portion of the voyage. When the risk has once commenced, it cannot be defeated by a subsequent event. Emerigon.

Lord MANSFIELD.—The law is clear that where the risk has never commenced the premium shall be returned. Where it has not been so held, different stages of the voyage could not be made. The inclination of my opinion has been on principle, that where, in a certain event, the risk shall not be run, there ought to be a return of premium. But where there is a usage it makes it clear, as it must then be understood to be ingrafted on the policy.

WILLES and ASHHURST, Justices.—Same opinion.

BULLER, Justice.—The only question is whether parol evidence was receivable. If it was, it is in this case decisive. In *Bond v. Gonzales, coram Holt*, 2 Salk. 445, Lord HOLT admitted such parol evidence. You may receive evidence to explain or control the policy.<sup>2</sup> In *Meyer v. Gregson*, 3 Dougl. 402, no usage was proved.

*Judgment for the plaintiff.*

## ENGLISH NOTES.

Here may be noted the questions which may arise upon an insurance made *bona fide* on the assumption of an interest which has never existed.

Where underwriters have resisted a claim on the ground of want of interest, and it appears there never had been a legal interest, although there was neither illegality in the voyage nor fraud in effecting the insurance, the insured was held entitled to a return of premium. *Routh v. Thompson* (1809), 11 East, 428, 10 R. R. 539. This was one of the

<sup>1</sup> The usage found was to return a part of the premium, without ascertaining what part. Lord MANSFIELD said he did not go on the usage.

<sup>2</sup> Mr. Justice BULLER must be understood to mean parol evidence of the usage of trade. See *Weston v. Emes*, 1 Taunt. 117.

**Nos. 94–96.—*Tyrie v. Fletcher; Bermon v. Woodbridge; Long v. Allan.*—Notes.**

cases arising out of the Danish embargo, and in circumstances similar to the leading case of *Lucena v. Craufurd*, 13 R. C. 151. The insurer was in a somewhat similar position to a captor under the Naval Prize Act, 1864 (27 & 28 Vict., c. 24; see in particular sect. 55).

Where, however, the subject insured has come home safely, the insured cannot afterwards claim the return of premium on the ground that he had no insurable interest. In *McCulloch v. Royal Exchange Assurance Co.* (1813), 3 Camp. 406, 14 R. R. 765, where the insurance was on ship and freight,—the ship having arrived safe, and the freight paid,—Lord ELLENBOROUGH said (3 Camp. 410): “The voyage has been performed, and the ship has arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter and to say you had no insurable interest. You might have rescinded the contract before the event; but, after that has been determined in favour of the underwriters, it does not lie in your mouth to tell them they never were liable, and that the premium was a payment without consideration.”

In cases of over-insurance and short interest, where under no circumstances could the insurer have been called upon for the full amount, there is a right to a proportionate return of premium. This is apparently assumed without question in several of the reported cases; such as *Forbes v. Aspinall*, 13 R. C. 673; *Rickman v. Carstairs* (1833), 5 B. & Ad. 651, cit. 13 R. C. 582; *Tobin v. Harford*, 13 R. C. 598.

## AMERICAN NOTES.

These cases are all cited by Mr. Parsons in his chapter on Return of Premium (1 Marine Insurance, pp. 505–517). He says: “If no part of the risk attaches, either because no part of the goods is shipped (*Graves v. Marine Ins. Co.*, 2 Caines [N. Y.], 339; *Scriba v. Ins. Co. of N. A.*, 2 Washington [U. S. Cire. Ct.], 107; *Toppan v. Atkinson*, 2 Massachusetts, 365), or because no part of the voyage takes place (*Forbes v. Church*, 3 Johnson Cases [N. Y.], 159), or because the insurance was predicated on a fact about which the parties were mistaken (as a blockade, *Taylor v. Summer*, 1 Massachusetts, 53), or because the insured had no interest (*Routh v. Thompson*, 11 East, 428), or because the vessel was unseaworthy and the risk never attached (*Porter v. Bussey*, 1 Massachusetts, 436; *Scriba v. Ins. Co. of N. A.*, *supra*; *Com. Ins. Co. v. Whitney*, 1 Metcalf [Mass.], 21), the whole premium is returnable.” So where the subject-matter is so erroneously described that the policy does not attach: *Robertson v. United Ins. Co.*, 2 Johnson Cases (N. Y.), 250; 1 Am. Dec. 166; or the contract becomes illegal by subsequent law: *Gray v. Sims*, 3 Washington (U. S. Cire. Ct.), 276; or the issue is unauthorized: *Lynn v. Burgoyne*, 13 B. Monroe (Kentucky), 400; *Foster v. U. S. Ins. Co.*, 11 Pickering (Mass.), 85; or void for untrue answers: *Insurance Co. v. Pyle*, 41 Ohio St. 19, citing *Tyrie v. Fletcher* and *Delavigne v. United Ins. Co.*,

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Nos. 94-96.—*Tyrie v. Fletcher*; *Bermon v. Woodbridge*; *Long v. Allan*.—Notes.

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1 Johnson Cases (N. Y.), 310. So of a life policy void for lack of consent of the assured life. *Fisher v. Met. L. Ins. Co.*, 160 Mass. 386; 39 Am. St. Rep. 495. So of a fire policy which never attached by reason of breach of warranty, not fraudulent. *Jones v. Insurance Co.*, 90 Tennessee, 604; 25 Am. St. Rep. 706, citing *Tyrie v. Fletcher*. The first two principal cases are cited in 14 Am. & Eng. Enc. of Law, pp. 400, 401, with the statement: "The law is the same in the United States." All are cited in 1 Beach on Insurance, sects. 364, 568.

In *Homer v. Dorr*, 10 Massachusetts, 26, the insurance was on voyage and return. The risk was held entire, although a custom to sever it was shown.

In *Taylor v. Lowell*, 3 Mass. 331; 3 Am. Dec. 141, there was insurance on vessel, cargo, and freight, while at and from Calcutta to the United States, to sail in August. The vessel sailed in August, but put back on account of leaks existing when the cargo was loaded. She was unloaded and repaired, reloaded, sailed again in February, and arrived safely. *Held*, that the risk attached, and the premium could not be recovered back. Citing *Tyrie v. Fletcher*.

Where an entire risk has once attached, the premium is earned, and no return can be had. *Turner v. Burrows*, 8 Wendell (N. Y.), 144; *Hendricks v. Com. Ins. Co.*, 8 Johnson (N. Y.), 1, citing all the principal cases. In the *Hendricks* case, SPENCER, J., dissented, arguing that "Lord MANSFIELD may be quoted in contradiction of himself in *Tyrie v. Fletcher*," and that it was "an *obiter dictum*, overruled by himself in *Meyer v. Gregson*." He also speaks of "another *dictum* of Lord MANSFIELD's in the case of *Bermon v. Woodbridge*," referring to his observations on *Bond v. Nutt*, and continues: "I do not intend anything disrespectful to that great man when I say, that neither his Lordship nor any of the Judges held any such doctrine in *Bond v. Nutt*."

In *New York F. Ins. Co. v. Roberts*, 4 Duer (N. Y. Super. Ct.), 145, OAKLEY, Ch. J., observed: "There is one respect in which an insurance against marine risks seems to be distinguished from all other contracts. Even when the policy has been signed and delivered, and the premium paid or secured to be paid, the contract may be dissolved at the election of one of the parties without the consent or knowledge of the other. It is to the assured alone, however, that this privilege belongs, and it is only in one mode that it can be exercised by him. He has not an unlimited discretion to annul the contract when and how he pleases. The contract can only be dissolved so as to exonerate him from the payment of the premium, or entitle him to demand its return, by his electing not to commence the voyage or adventure to which the insurance relates. If a ship insured to Havre sails for Liverpool, or goods insured to one port are shipped for another, or are not shipped at all, the contract is at an end, and the underwriters lose their premium. But if the voyage or adventure insured is not abandoned nor broken up, the assured cannot put an end to the contract by a mere declaration and notice of his intentions. He cannot dissolve the contract because he is dissatisfied with its terms, and prefers to become his own insurer, or believes he can effect a new insurance covering the same risks at a lower rate of premium. Where the risks described in the policy are so commenced that by the terms of the insurance the underwriters would be liable for a loss, they are entitled to retain or

No. 97.—*Bradford v. Symondson*, 7 Q. B. D. 456.—Rule.

recover the premium, unless it is proved that before the risks commenced or terminated they had consented to dissolve the contract; and we apprehend that these rules are just as applicable where the policy covers successive risks, as where it is confined to a single voyage; although when the risks are not merely successive, but distinct and independent, so that the premium may be apportioned, the non-inception of a portion of the risks will doubtless warrant a proportionate return or diminution of the premium."

In *Waters v. Allen*, 5 Hill (N. Y.), 421, *Tyrie v. Fletcher* is cited, and the observation of Lord MANSFIELD that the premium shall be returned "where the risk has not been run, whether its not having been run was owing to the *fault*, pleasure, or will of the insured," was applied in a case where the policy was on distinct risks, with a separate premium on each, and immediately after the first risk had commenced the insured had fraudulently destroyed the vessel, and consequently the other risks had not attached. BRONSON, J., observed: "Although this, like some other sweeping remarks made by that great man, must be taken with some allowance, I think it may safely be applied to this case." "I think this a safe rule, *viz.*, that where the insured sues for a loss, and fails on the ground that his contract is void by reason of his own fraud in procuring it, or where he sues for a return of premium, and is obliged to show his own fraud in making title to the money, then he shall not have a return; but when the contract is valid, and the insured can make title to a return of premium without showing his own fraud, there he may recover, although but for his own fault the peril insured against might have been run."

No. 97.—*BRADFORD v. SYMONDSO*N.

(c. a. 1881.)

## RULE.

IN a question of return of premium, the risk is considered to have been entered upon, if there is, at the time of making the contract, an uncertainty in contemplation of both parties as to the safety of the adventure; although in point of fact the risk may at that time have been determined by the safe arrival of the ship and cargo.

**Bradford v. Symondson.**7 Q. B. D. 456-465 (*s. c.* 50 L. J. (Q. B.) 582; 45 L. T. 364; 30 W. R. 27).

*Insurance.—Policy attaching. - Risk determined in Fact but not in Knowledge of Parties.—Action for Premium.*

The defendant, who had insured a cargo by a certain vessel lost or not lost for a certain voyage, believing such vessel to be overdue, effected a policy of reinsurance with the plaintiff on the same cargo and risk.

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Before effecting the policy of reinsurance, the vessel and cargo had in fact arrived safely at the port of destination; but this was not known to either the plaintiff or defendant at the time the policy was effected.

*Held*, that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected.

On the 3rd of October, 1879, the Phoenix Insurance Company of New York, insured by declaration on an open policy of the 22nd of September, 1876, a cargo by the *Alata*, lost or not lost, from Philadelphia to Rochfort.

On the 23rd of December, 1879, the Phoenix Insurance Company, by the defendant as their agent, effected at a premium of 75 guineas per cent a Lloyd's policy, which was underwritten by the plaintiff, as a reinsurance to the extent of £1500 on the same cargo and risk as was so insured by the Phoenix Insurance Company.

The *Alata* sailed from Philadelphia to Rochfort, on the 1st of October, 1879, with the cargo on board, and arrived safely at Rochfort on the 14th of November, 1879, discharged there her cargo undamaged, and sailed thence on the 18th of December, 1879; but at the time of effecting the policy of reinsurance of the 23rd of December nothing had been heard of the arrival of the *Alata*, and neither the plaintiff nor the defendant nor the Phoenix Insurance Company knew that she and her cargo had then safely arrived. Under these circumstances the Phoenix Insurance Company, and the defendant as their agent, refused to pay the premium, contending that there had been nothing to insure and no risk by the plaintiff.

The plaintiff accordingly brought this action to recover the premium payable by the said policy. The action was tried before

Lord COLERIDGE, Ch. J., without a jury, on the admitted [\* 457] facts, at \* the Middlesex Trinity sittings, 1880, when his

Lordship gave judgment for the plaintiff for the amount claimed.

From this judgment the defendant appealed.

March 1 and 3. Benjamin, Q. C., and French for the defendant. — At the time the policy of reinsurance was made, there was no risk to be run, and therefore no consideration for the premium. The rule is thus stated by Lord MANSFIELD, in *Tyrie v. Fletcher*, 2 Cowp. 666, 668 (p. 502, *ante*), "Where the risk has not been run, whether its not having been run was owing to the fault,

## No. 97. — Bradford v. Symondson, 7 Q. B. D. 457, 458.

pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity." It is admitted, on the part of the plaintiff, that if the voyage had never begun there would have been no risk, and the premium would have to be returned; then, if the voyage is over and the ship has arrived safely, how can there be any risk? The reinsurance was made here, under circumstances of a mistake, in fact, by both parties, and the premium, therefore, ought not to be payable. *Oom v. Bruce*, 12 East, 225 (11 R. R. 367); *Hentig v. Staniforth*, 5 M. & S. 122; and *nom. Henry v. Staniforth*, 4 Camp. 270 (17 R. R. 293). No doubt "the insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made;" 2 Parsons on Insurance, p. 44; and in *Sutherland v. Pratt*, 11 M. & W. 296, it was held to be no answer to an action on a policy on goods (lost or not lost), that the interest in them was not acquired until after the loss. "Such a policy," says Lord WENSLEYDALE, in that case, "is clearly a contract of indemnity against all past as well as all future losses sustained by the assured in respect to the interest assured." But, as stated in 2 Arnould on Insurance, 5th ed. p. 1057, "in case the risk had no inception, whatever may have been the cause, even the neglect or fault of the assured himself, provided it be not his actual fraud, the premium is by law to be returned." Then he says, "The general law *maritima* agrees with our own on this point, and is based on the same principles," citing 2 Emerigon, c. xvi. § 1, p. 186. On behalf of the plaintiff reliance will be placed on \* 2 Park on Insurance, cap. xix. 7th ed. p. 562, where there is the following passage: "If the ship be arrived before the policy is made and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored on the ground of fraud. But if both parties be ignorant of the arrival and the policy be (as it usually is) lost or not lost. I think, in that case, the underwriter should retain it; because, under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription." He, however, subsequently states, at p. 563, "The principle upon which the whole of this doctrine depends is simple and plain, admitting of no doubt or ambiguity. The risk or peril is the consideration for which the premium is to be paid; if the

[\* 458]

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risk be not run, the consideration for the premium fails; and equity implies a condition that the insurer shall not receive the price of running a risk, if, in fact, he runs none." In 2 Phillips on Insurance, sect. 1826, it is also said, "The risk may have terminated before the policy is made, yet if it be so made that it would have applied to any loss that might have happened during the risk, no return of premium can be demanded." Here the policy of reinsurance was made on the assumption that the voyage had not terminated, and that the Phoenix Insurance Company might be liable to pay for a loss. This was a mistake; there never was any risk, and the policy of reinsurance never did and never could attach. Next, the defendant never had any insurable interest when the policy of insurance was effected. "The rule, in fact, is, that if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever, the assured is entitled to recover back the whole premium." 2 Arnould on Insurance, 5th ed. p. 1066.

[BRETT, L. J. — That second point seems to be the same as the first, for during the whole time of the insured voyage the assured had insurable interest, but as the voyage had terminated, it is said there was no insurable interest.]

There was no interest when the second policy was effected.

[BRETT, L. J. — You say there was no insurable interest when that policy attached; but then when did it attach? Might it not attach to a time before it was made?]

[\* 459] \* It might cover losses before it was made, but it could not attach unless there was something then existing to which it could attach, and that was not so here.

Cohen, Q. C., and Hollams for the plaintiff. — With regard to the first point, there was a risk when the policy of reinsurance was made. The policy would cover past as well as future losses, and there is no condition, expressed or implied, that if the voyage be ended when it is made, the premium shall be returned. "The form of the policy in England and the United States contains the words 'lost or not lost'; and if the subject insured be lost or has arrived in safety when the contract is made, it is still valid if made in ignorance of the event, and the insurer must pay the loss or not pay it, as the case may be. This is laid down by the foreign jurists as a general principle of insurance without reference to those words which are said to be peculiar to the

No. 97.—**Bradford v. Symondson, 7 Q. B. D. 459, 460.**

English policies." 3 Kent's Commentaries, 12th ed. p. 259. In case of fraud on the part of the insurer, the premium must be returned, as if he knew at the time of making it that the vessel had arrived. 2 Arnould on Insurance, 5th ed. 1064, citing Lord MANSFIELD in *Carter v. Boehm*, 3 Burr. 1905. That would seem to imply that where the insurer did not so know of the arrival of the vessel the premium would not be returnable. The French and German law is to the same effect. Code de Commerce, arts. 366 and 367; German Code, art. 789. The cases of *Oom v. Bruce*, 12 East, 225 (11 R. R. 367), and *Hentig v. Staniforth*, 5 M. & S. 122 (17 R. R. 293), are very different from the present one. They were cases where the policy was void, and never attached at all. The second policy, in the present case, was never void, and the consideration, which, in fact, was the plaintiff's undertaking to indemnify against past and future losses, did not wholly fail. Suppose the vessel had been lost, being at the bottom of the sea when the policy was made, there might equally be said to be then no risk to be run, for the event was certain in the sense that it had happened, though uncertain in the sense that it was unknown, but the undertaking to indemnify against this loss would be a good consideration for the premium. There is a case of *Natusch \* v. Hendewerk*,<sup>1</sup> exactly in point, in which the [ \* 460] late Mr. Justice WILLES decided that an insurer had a right to the premium on a policy of insurance which was effected, as in the present case, after the vessel had in fact arrived at her port of destination. In Emerigon, cap. xv. § 3, e.d. translated by Meredith, p. 635, it is said: "If there is no fraud, and one of the

<sup>1</sup> Not reported. It was an action by insurance brokers to recover the premium due in respect of a policy of insurance against war risk only, effected by them for and at the request of the defendant on the *Friede*, a German vessel, on a voyage from Dantzig to Hull, during the war of 1870 between France and Germany. Some few hours before the policy was effected, the *Friede* had arrived safely at her port of destination, but the insurance was ordered and effected in ignorance by either party of such arrival, and upon the supposition that the said vessel was still at sea. By arrangement the action was not tried at Nisi Prius, but left to the decision of WILLES, J., who heard the case at cham-

bers in April, 1871, where it was argued on the admitted facts by J. C. Mathew, for the plaintiffs, and Cohen, Q. C., for the defendants. That learned Judge was of opinion that in the absence of knowledge that the vessel had arrived at Hull, the policy ought to be treated as a contract that during the voyage, which was an existing one, the vessel, which was also an existing one, had not been and should not be captured, and that if the policy did so protect the assured from any damage that might have been sustained, it was difficult to see why the underwriter was not entitled to his premium. He accordingly directed a verdict to be entered for the plaintiffs for the amount of their claim.

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No. 97.—**Bradford v. Symondson**, 7 Q. B. D. 460, 461.

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parties is not better informed than the other, the least uncertainty of the event, fortunate or unfortunate, suffices to render the insurance valid;” and referring to Valin’s statement that it is one thing to know the loss of a vessel, and another to have room, and even just cause for fear, Emerigon goes on to say, “In the first case, the insurance is void; in the second, it is valid, if there be neither fraud nor dissimulation, nor false assertion.”

Then as to the second point, the assured had an insurable interest, and he had it at the time the voyage commenced. This was a policy of reinsurance, and the plaintiff would stand in the place of the insurer under the first policy, and whatever that insurer would be liable to pay, the plaintiff would be liable to pay.

[BRAMWELL, L. J.—Suppose no goods had been shipped, the premium would then be returnable; but why?]

Because in that case there could be no possibility of liability of the underwriter on such a policy, as there would then [\* 461] never be a \* time when the assured could have had a loss during the voyage. The policy would never have attached, but when once it has attached the premium is not returnable.

BENJAMIN, Q. C., in reply.—Emerigon is not always to be relied on. The passage cited from Emerigon is not to be reconciled with the passage by the same writer at page 636 of Meredith’s edition. He there states that he was consulted, in 1781, on an insurance made at Marseilles, on cargo of a vessel already arrived in the port of that town, and that the insurer contended that the premium was due to him, because at the time of signing the policy he did not know the return of the vessel, but that he, Emerigon, was of a contrary opinion, stating that the risk on goods of a vessel already arrived at the port of its destination had never been made by itself the subject of a maritime insurance.

*Cur. adv. vult.*

April 1. BRETT, L. J.—It is proposed that I should give judgment first in this case. The action is brought for the recovery of the premium payable on a policy of insurance effected by the defendant with the plaintiff, and the defence is that the policy never attached. The policy was underwritten by the plaintiff by way of reinsurance of a cargo by a certain vessel from Philadelphia to Rochfort, which the defendant had insured. The vessel had not only sailed from Philadelphia to Rochfort with the cargo on

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board, but the voyage had been completed with safety and without any damage to the cargo whatever, when the reinsurance was made by the defendant with the plaintiff, but this was not known to either party at the time this policy was entered into. It was supposed then that the vessel was overdue (and the policy was therefore made at a very high premium), though I think that that is a fact which is wholly immaterial, and that the same question would have arisen if the parties had not supposed the vessel was overdue.

The great question in this case was whether this policy of reinsurance had attached at all, and it was said that it had not, because at the time it was entered into, the risk had determined, and there was no risk in existence. If one examines that proposition carefully, it really comes to this, that at the time the \*policy which is the subject-matter of this action was [\*462] entered into, the question of whether there was or could be a loss or not was determined in fact, and to this extent that there could be no loss. Now this policy covers the risk which the defendant, or those for whom he was acting as agent, were supposed to be under upon the policy made by them as insurers. Therefore the risk insured by this policy is in terms the risk under which the assured stood on the policy made by them during the voyage described in their policy. So it is obvious that the risk of the plaintiff existed during the whole of the voyage described in this policy. But then the objection is, that when the present policy was in fact made, the question, of whether any loss could or could not be sustained by the assured, was in fact determined. Is that a good objection to the attachment of a policy? It seems to me that it is not, because if stated in those terms it applies to a policy of lost or not lost, and the fact that the ship or goods the subject-matter of the policy has been lost at the time the policy was made, would be destructive of the attachment of the policy, which is not true, as every one knows. Indeed the decisions, or at all events the *dicta* of Lord MANSFIELD, and others of the greatest insurance Judges in England, have gone as far as this, that if both parties knew that the subject-matter was lost at the time when they entered into the policy, and the policy, in terms, covers that loss, the policy is good. As, for instance, if the parties have verbally agreed to the insurance, or have passed a slip at the time, when the passing of a slip was

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supposed to have had no effect, but as an undertaking of honor, nevertheless, if having done so the underwriters, when the loss was known to both parties, entered into the policy, it would be, as was said by Lord MANSFIELD, according to the law of England, a good policy. Therefore it seems to me, upon principle, that the fact, that the question of whether there was a loss or not, was determined before the making of the policy, is no objection to the policy.

How, then, stand the authorities? Mr. Benjamin was bound to admit, as far as I could see, that every writer on insurance law was against the view proposed by him. Emerigon was against him, but then he objected to the authority of Emeigron.

It is true that Emerigon is not always an authority to be [\*463] followed; \*but, nevertheless, he is always quoted as an

authority with regard to insurance law, and his language is certainly to be carefully considered before it is rejected. But Park on Insurance was against him, and Park on Insurance has always been cited by Judges in England and America as a book of considerable authority. Then Arnould was against him, and so was Phillips, and I venture to say that, of all the great text authorities upon insurance law, Phillips is the one most to be considered. Therefore all the text-books, as far as I can see, are in support of what seems to me to be the right view, according to principle. Moreover, we have the high authority of Mr. Justice WILLES in the case of *Natusch v. Hendewerk* (*ante*, p. 525, n.), which is substantially directly in point. It was an action for the premium paid on effecting a policy, and the question was raised whether the fact of the voyage having been ended, if unknown to both parties at the time, prevented the policy from attaching, and that learned Judge held that it did not.

Therefore it seems to me, both on principle and authority, that the mere fact of the voyage insured having been at an end, did not prevent the policy of reinsurance from attaching, and if so the premium is due.

But then it was said there was no insurable interest on the part of the defendant, or those for whom he was agent under the policy, the subject of this action.

Now what was the insurable interest of the assured under this policy? The insurable interest was the risk which he ran under the former policy. If this policy therefore attached, it attached

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in respect of the voyage insured under that first policy, and during the whole of that policy the risk of the Phoenix Company under it did exist, and, therefore, it seems to me that the question of insurable interest in this case comes to be the same question precisely as the question whether the risk ever attached. If the risk attached, and as long as it attached under the first policy, or under this second policy, the defendant's interest attached for the same time and during the whole of the same period. Therefore there was an insurable interest. This decision seems to me to come to this, that were the subject-matter insured

\* has been, or is or will be, at risk, the policy attaches to [\* 464] it and covers it, whether the policy be made before, or during, or after the time when the subject-matter was at risk, if that risk is properly described in the policy. I think, therefore, that the judgment for the plaintiff was right.

BAGGALLAY, L. J.—I am of the same opinion, and I have nothing to add.

BRAMWELL, L. J.—I will add a few words, in confirmation of what has been said by my Brother BRETT. On the question of whether the policy attached, I think it did. The fallacy in the defendant's argument arises from the double meaning of the word "risk." That means both the voyage commenced with necessary conditions to make the underwriters liable, and also the chance of loss during its performance. In the latter sense, there was no risk at the time of reinsurance. But that is not the sense in which the word is used by the authorities. It is used in the first sense I have mentioned, and in that sense it clearly existed in this case. There was therefore a risk such that if the premium had been paid the defendant could not have recovered it back. Suppose it had been known to both parties that the ship had arrived for twenty-four hours, and still the defendant had been minded to reinsure, and had done so at a low premium, it cannot be doubted that the premium would have to be paid. If that is true of twenty-four hours, it is equally so of twenty-four or any other number of days; and if it is true when both parties know, it is equally true when they do not.

I think, therefore, the policy attached. All the authorities, as my Brother BRETT says, who have expressed an opinion on the matter are in favour of this view. And the utmost that can be said of the others is that they do not decide it one way or the

**No. 98. — Feise v. Parkinson, 4 Taunt. 640. — Rule.**

other. It is said that the same considerations determine the other question in favour of the plaintiff. On this I confess I am not so clear. It is said that the interest of the defendant was in his possible liability, and that the existence of a loss being uncertain to his knowledge, he might insure against it. I am not altogether satisfied on this. Suppose an insurance warranted [\* 465] \* free from capture, and suppose a reinsurance on the same terms on the same voyage, but the ship captured before reinsurance, would the insurer have an insurable interest? I doubt it. But as my Brethren do not, and as I only doubt, I concur on this point also.

*Judgment affirmed.*

**AMERICAN NOTES.**

This case is cited in 14 Am. & Eng. Enc. of Law, p. 401, without any analogous American cases.

**No. 98. — FEISE v. PARKINSON.**

(C. P. 1812.)

**RULE.**

If the contract is avoided, at the instance of the insurer, on the ground of an innocent misrepresentation by the insured, the latter is entitled to a return of the premium on the ground that the risk has never been incurred.

**Feise v. Parkinson.**

4 Taunt. 640-642 (13 R. R. 710).

***Insurance. — Innocent Misrepresentation. — Return of Premium.***

[640] If a policy be avoided by a misrepresentation made without fraud, the assured is entitled to a return of the premium.

This was an action upon a policy, at and from Hamburgh, or any port or ports in the Elbe, to London, or any other port or ports of the United Kingdom. Upon the trial of this cause at Guildhall, at the sittings after the last Michaelmas Term, before MANSFIELD, Ch. J., the plaintiff proved the subscription, loss, and interest; and the defendant rested his case upon a misrepresentation made to the first underwriter at the time of effecting the

## No. 93.—Feise v. Parkinson, 4 Taunt. 640, 641.

policy, to whom, as it was sworn by the broker, the plaintiff had stated that the ship had both an English license and a French imperial license, whereas the fact was that the ship had an English license, and a French pass from Cuxhaven, which enabled her to come down the Elbe from Hamburg, and put to sea without molestation at Cuxhaven, but by no means operated as a license to her to trade with England; and it was sworn that the circumstance of having a French imperial license made a considerable difference in the amount of the premium of insuring such a voyage at the time when this policy was effected. The jury found a verdict for the defendant.

Shepherd, Serjt., in Hilary Term last, moved for a rule *visi* to set aside the verdict and have a new trial, upon an affidavit of the plaintiff, that the broker who gave testimony to his representation of the ship having a French imperial license was totally mistaken in that \* point, and that the plaintiff's representation upon that head was, that the ship had a French pass, as the proof showed that she had. He also swore that at the time of effecting this policy, French imperial licenses had not been heard of at Lloyd's. Secondly, Shepherd contended that if the plaintiff were not entitled to a new trial, he was entitled to a verdict for a return of premium; for that if there had been any misrepresentation, it was clearly not fraudulent, but originated in mistake; and if a person without fraud represents circumstances which prove to be not true, this is, like the case of a warranty not complied with, a ground for recovering back the premium, inasmuch as the risk has never been incurred. If this were not so, a representation would have greater effect than a warranty. The Court granted the rule in the alternative, embracing both points.

Lens, Serjt., in this term showed cause against the first part of the rule, upon the evidence which had been given at the trial; and the Court were of opinion that the mere affidavit of the plaintiff alone, unsupported, was not a sufficient ground to grant a new trial; upon the second point he contended, that where there had been a misrepresentation, whether fraudulent or not, the plaintiff could not be entitled to a return of premium; thirdly, that the plaintiff was precluded, because he had not claimed it at the trial.

GIBBS, J.—Where there is fraud there is no return of premium; but upon a mere misrepresentation without fraud, where the risk

No. 98.—*Feise v. Parkinson*, 4 *Taunt.* 641, 642.—Notes.

never attached, there must be a return of premium. This business is conducted on the part of the assureds, with the utmost imprudence; these transactions are done by parol between the plaintiff and defendant, the broker only present, and on which side his interest leans, if he be dishonest, all know; as [\* 642] long \*as it is the law, we must admit it; but this is one, among other proofs, of the mischievous tendency of admitting parol evidence of what passes at the time of making written instruments, to control them. It is clear that the plaintiff is not entitled to a new trial on the first ground. I think it equally clear that the plaintiff is entitled to enter his verdict on the count for money had and received for the premium, but as the return of premium was not claimed at the trial, that cannot be done without the defendant's consent. Upon the other counts, the verdict must be for the defendant: if the defendant will not consent, the Court must grant a new trial generally.

On the following day, Lens, after consulting his clients, consented to the plaintiff's taking a verdict for the premium; and that branch of the rule was therefore made

*Absolute.*

## ENGLISH NOTES.

The law as laid down by GIBBS, J., in this case is fully recognised in *Anderson v. Thornton* (1853), 8 Ex. 425. It was an action on a policy where material misrepresentation was proved, but all imputations of fraud were withdrawn at the trial. PARKE, B., says: "With respect to the return of the premium, there is no doubt in my mind that the plaintiffs would be entitled to recover it, as there was no fraud in the representation; if there had been, the case would be different. The insurance never bound the defendant, and consequently the plaintiffs were entitled to the return of the premium." The course which had been taken at the trial, however, prevented the plaintiff recovering the premium in that action; but it was the opinion of the Judges that he might recover it in another action for money had and received. So where there has been a breach of warranty (not implying actual fraud), where the warranty is an essential condition of the whole insurance. *Hinkle v. Royal Exchange Assurance Co.* (1749), per Lord HARDWICKE. L. C., 1 Ves. 317, 319; *Long v. Allan*, No. 96 *ante*, and *Colby v. Hunter* (1827), 3 Car. & P. 7, Moody & Malkin, 81.

In a case of fraud, however, that is to say, where the insured has personally made or authorised a representation which is false to his knowledge, or been personally guilty of concealment of a material fact,

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No. 99.—**Lowry v. Bourdieu**, 2 Doug. 468.—Rule.

there is no doubt that he is debarred from claiming return of premium. *Tyler v. Horne*, *Chapman v. Fraser*, 2 Marshall Insur.; 2 Arnould Insur. In *Tyler v. Horne* (it is observed) the fraud was very gross, for the insured had authorised his broker to effect the policy after receiving private information of the loss of the ship.

## AMERICAN NOTES.

This case is cited by Parsons (1 Marine Insurance, p. 516), and is supported by cases cited in notes to No. 96, *ante*, p. 519. The rule is clearly otherwise in case of fraud. *Hoyt v. Gilman*, 8 Mass. 336; *Schwartz v. U. S. Ins. Co.*, 3 Washington (U. S. Circ. Ct.), 170; *Himely v. So. Car. Ins. Co.*, 1 Mills (So. Car.), 154; *Hearne v. Marine Ins. Co.*, 20 Wallace (U. S. Sup. Ct.), 488.

## No. 99.—LOWRY v. BOURDIEU.

(1780.)

## No. 100.—VANDYCK v. HEWITT.

(1800.)

## RULE

AN action will not lie either for payment of the sum insured, or to recover a premium paid, upon an insurance which is illegal, by reason of the policy being illegal by statute, or by reason of the illegality of the adventure insured.

**Lowry v. Bourdieu.**

2 Doug. 468-472.

*Insurance. — Want of Interest. — Safe Arrival. — No Return of Premium.*

An insurance being made without interest, and the premium paid, the [468] insured shall not recover back the premium after the ship has arrived safe.

The plaintiffs had lent to Lawson, captain of the *Lord Holland*, East Indiaman, £26,000, for which he had given them a common bond, in the penal sum of £52,000. While he was with his ship at China, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from China to London, beginning the adventure, upon the goods from the loading thereof on board the said ship at Canton

## No. 99. — Lowry v. Bourdieu, 2 Doug. 468, 469.

in China, &c., upon the said ship, &c., from and immediately following her arrival at Canton in China, valued at £26,000, being the amount of Captain Patrick Lawson's common bond, payable to the parties as shall be described on the back of this policy; and it bears date the 16th day of December, 1775; and, in case of loss, no other proof of interest to be required than the exhibition of the said bond: warranted free from average, and without benefit of salvage to the insurer." At the head of the subscriptions was written, "On a bond as above expressed." Captain Lawson sailed from China, and arrived safe with his privilege (as it is called), or adventure, in London, on the 1st of July, 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. In 1780, the insured brought this action for a return of the premium, on the ground that, the policy being without interest, the contract was void. The cause came on before Lord MANSFIELD, at Guildhall, at the sittings after the last Trinity Term, when his Lordship was of opinion that the policy was a gaming policy, prohibited by the statute of 19 Geo. II., c. 37, and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis* was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordship's direction; but, the next morning, he expressed a doubt as to the propriety of his opinion,

because the money had been paid upon an executory agreement [469] which could never have been completed; and, the first

day of this term, Bearcroft obtained a rule to show cause why a new trial should not be granted. He insisted that the contract was to be considered as executory in its nature, the premium having been paid before the risk commenced.

This day cause was shown by the Attorney-General, Cowper, and Dunning.

They contended that, in truth, and substantially, the plaintiffs had an insurable interest. That though this was, in form, a policy on the ship and goods, yet the bond was stated, in the very body of the policy itself, as the real interest of the insured. If there was no insurable interest, yet, as the plaintiff's paid the money with their eyes open, and not under any mistake of the law, as they expressly stipulated that the bond should be, between them and the underwriters, the only proof of interest that should

No. 99.—**Lowry v. Bourdieu, 2 Dougl. 469, 470.**

be required, or, in other words, that it should pass for interest, as between them, whether the law considered it as such or not; as they most undoubtedly would have called upon the defendant if the ship had been lost,—the Court will not assist them in recovering the premium, although paid upon an illegal consideration. It may be said that, in case of a loss, the law would not have compelled the underwriters to pay. That may be true; but it would have been dishonourable in them to refuse, and the principle in such cases is, that the Court ought to remain neutral. If the underwriters had, in fact, paid, the Court would not have assisted them in recovering back their money, in an action for money had and received. Many cases of the same sort were mentioned by Lord MANSFIELD at the trial, where money, the payment of which could not have been compelled by law, having been actually and voluntarily paid, it cannot be recovered back in an action; as, for instance, money paid by an infant, or on time-contracts for the price of stocks. As to the payment of the premium, though there is a receipt for it on the policy, yet it is well known that, in point of fact, it is never paid at the time of underwriting, but remains an article in the current account between the broker and the underwriter.

Bearcroft, on the other side, argued that as the plaintiffs could not have recovered for the loss, and had made the insurance under a mistake of the law, not with an intention to act against it, they ought to recover back the premium, as paid without any consideration. It happens every day that the premium is [470] recovered back when it has been paid upon a mistake in point of law, if no fraud or illegal intention appears. The parties here were guilty of a blunder, and nothing more. If they had intended a fraud upon the statute, they would not have stated the nature of their supposed interest in the very policy itself. There are cases where even on a policy clearly illegal the premium has been decreed to be paid back, in a Court of equity. In *Willingham v. Thornborough*, Cane. H. 1690, Prec. in Chanc. 20, upon a bill brought to be relieved against an illegal policy, the Court made it a condition that the plaintiff should return the premium. If it is said that the reason of that decision was, that it is a rule in Courts of equity never to give relief, even in cases of gross fraud, without ordering what is really due on either side to be paid, that rule will apply, and ought to govern, in the present

No. 99.—*Lowry v. Bourdieu, 2 Dougl. 470, 471.*

case, for this Court has often said that mercantile questions ought to be decided in the Courts of law according to equitable principles.

Lord MANSFIELD.—It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance: mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say, “We mean to game; but we give our reason for it. Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us.” It was a hedge. But they had no interest; for, if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson. This, then, is a gaming policy, and against an Act of Parliament; and therefore it is clear that the Court will not interfere to assist either party, according to the well-known rule, that, *in pari delicto, &c.* Not that the defendant’s right is better than that of the plaintiffs, but they must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark by taking too long an aim.

[471] WILLES, J.—I shall make no apology for differing from the rest of the Court, in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had an idea they were entering into an illegal contract. The whole was disclosed, and they thought there was an interest. This was a mistake, but it is a new point of law. The case cited from Precedents in Chancery is not, perhaps, decisive, but it goes a great way; and it would be very hard that a party should lose what he has paid under a mere mistake. I think, in conscience, the defendant ought to refund the premium.

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ASHHURST, J.—I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice, which shows decisively that this was a gambling policy.

BULLER, J.—It is very clear to me that the plaintiff's ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gambling policy, without interest. There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman* some years ago in this Court, where a sum of money had been paid in order to procure a place in the Customs. The place had not been procured, and the party who had paid the money having brought his action to recover it back, it was held that he should recover, because the contract remained executory. So, if the plaintiffs in the present case had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk (such as it was, not, indeed, founded in law, but resting on the honour of the defendant) had been completely run. It makes no difference whether the premium was paid before the voyage or after it.

*The rule discharged.*

Lord MANSFIELD said, he desired it might not be understood that the Court held that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for in such cases the parties are not *in pari delicto*.

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No. 100.—**Vandyck v. Hewitt, 1 East, 96, 97.**

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**Vandyck and others v. Hewitt.**

1 East, 96-98 (5 R. R. 516).

*Insurance. — Illegal Voyage. — No Return of Premium.*

[96] The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss.

The plaintiff declared upon a policy of insurance on goods at and from London to Embden or Amsterdam, at a premium of ten guineas per cent, to return five upon their arrival at the place of destination; with an averment that the insurance was made for the benefit of certain persons therein named; and then declared as upon a loss by capture in the course of the voyage insured. The declaration also contained counts for money paid and for money had and received.

The goods were shipped on board a Prussian neutral vessel, on account, partly, of the plaintiffs, who were naturalised foreigners, resident in London, and partly of certain other persons, aliens, then resident in Holland. At the trial at Guildhall the insurance itself was abandoned on the ground of its being intended to cover a trading with an enemy's country, Holland being, at the time of such insurance, in a state of hostility with this kingdom, and therefore falling within the decision of the case of *Potts v. Bell*, 8 T. R. 548 (5 R. R. 452); but it was contended that the plaintiffs were entitled to recover back the premium, because the policy never attached, and, consequently, the defendant's risk never commenced. Lord KENYON permitted a verdict to be taken for the plaintiff for that amount, with liberty to the defendant's counsel to move to set that aside and to enter a verdict for the defendant. A rule *nisi* was accordingly obtained on a former day in this term for that purpose; against which

Erskine, Park, and J. Warren now showed cause. Here was no fraud intended, as in the case of smuggling [\*97] \* transactions. The assured are neutral foreigners, who have paid money to the defendant for a certain consideration, the benefit of which they are precluded from receiving by a rule of public policy: it is but just, therefore, that as the insurance never attached, and the underwriter has not incurred any risk, he should not be suffered to retain the consideration. *Tyrre*

No. 100.—*Vandyck v. Hewitt*, 1 East, 97, 98.—Notes.

v. *Fletcher*, 2 Cowp. 668 (p. 502, *ante*). Admitting the contract to be illegal, yet, according to *Lucaussade v. White*, 7 T. R. 535, the party who has deposited money upon an illegal consideration (as in that case upon an illegal wager) may recover it back again, even after the event is determined against him. They also referred to the case of *Nesbitt v. Whitmore*, in Easter Term last, where this point was agitated, and where, finally, the premium was returned.<sup>1</sup>

*Law and Garrow, contra*, were stopped by the Court.

Lord KENYON, Ch. J.—There is no distinguishing this on principle from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover \* back the [\* 98] goods themselves or the value of them. The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

LE BLANC, J.—The ground of the determination in *Lucaussade v. White* has been since very much canvassed in a later case, of *Howson v. Hancock*, 8 T. R. 575, where it was considered that money deposited upon an illegal wager, and paid over to the winner, could not be recovered back from him.

PER CURIAM.

*Rule absolute for the verdict to be entered  
for the defendant.*

## ENGLISH NOTES.

In *Lubbock v. Potts* (1806), 7 East, 449, a ship and goods were insured from Trinidad to Gibraltar. At this time it was contrary to the navigation laws to ship colonial produce to any port of Europe except the ports of Great Britain. It was held that the premium could not be recovered back.

So in *Andree v. Fletcher* (1789), 3 T. R. 266, 1 R. R. 701, where the policy was a reinsurance which was at that time unlawful by statute.

<sup>1</sup> In that case, under similar circumstances with the present, Giles for the plaintiff admitted that he could not recover the loss upon the policy since the determination in *Bell v. Potts*; but he contended that the plaintiff was entitled to take a verdict for the premium, which had not been paid into Court. This was resisted by Park for the defendant, on the ground that no such question had been reserved at the trial. *Et per Curiam*. That point not having been made, and the jury not having assessed any such damages, but

only the amount of the loss to be recovered, supposing the plaintiff to be entitled to it in point of law, we cannot now interpose any other sum in lieu of their verdict. Whereupon Giles prayed leave to amend the verdict by the Judge's notes. The Court, with much reluctance and with a view to a compromise, granted a rule to show cause. And afterwards it was agreed between the parties that the premium should be repaid, without costs on either side.

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No. 1. — **Calton v. Bragg.** — Rule.

This was followed in *Howard v. Refuge Benefit Society* (1886), 54 L. T. 644, where the insurance was a wagering policy, and illegal under 14 Geo. III., c. 48.

## AMERICAN NOTES.

These cases are cited and approved in 1 Parsons on Marine Insurance, p. 515, and in 14 Am. & Eng. Enc. of Law, p. 401.

So an underwriter cannot recover on a premium note given for an illegal insurance. *Russell v. De Grand*, 15 Massachusetts, 35. The *Lowry* case was cited and approved (*obiter*), by KENT, J., in *Juhel v. Church*, 2 Johnson Cases (N. Y.), 333. See *Richardson v. Maine Ins. Co.*, 6 Massachusetts, 102; 4 Am. Dec. 92.

If the illegality arose by force of subsequent law, the premium may be recovered. *Gray v. Sims*, 3 Washington (U. S. Cir. Ct.), 276.

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## INTEREST.

See also No. 20 of "ADMINISTRATION" and notes, 2 R. C. 172, *et seq.*: also Nos. 1 and 2 of "INFANT," and notes, 13 R. C. 1, *et seq.*

No. 1. — **CALTON v. BRAGG.**  
(K. B. 1812.)No. 2. — **COOK v. FOWLER.**  
(H. L. 1874.)

## RULE.

By the common law of England, there is no right to interest upon money except by contract.

In an ordinary contract for repayment of money lent or for payment for goods sold, there is no implied contract for payment of interest.

And where interest is allowed upon money payable under a written instrument at a fixed date, or wrongfully withheld after demand under the statute of 3 & 4 Will. IV., c. 42, s. 28, or otherwise than by contract expressed or implied, it is only allowed by way of damages, and subject to a consideration by the Court or jury of all the circumstances of the case.

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No. 1.—**Calton v. Bragg, 15 East, 223, 224.**

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**Calton v. Bragg.**

15 East, 223–230 (13 R. R. 451).

*Interest. — Allowed only by Contract or Usage.*

Interest is not allowable by law upon money lent generally, without a [223] contract for it expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of principal money at a given time.

The plaintiff declared upon the common counts for goods sold and delivered, for money lent, money paid, money had and received, and also upon a count for the interest due to him for the forbearance of sums of money before then lent and advanced by him to the defendant, and paid, laid out, and expended for his use, and had and received by the defendant to the use of the plaintiff, &c. It was stated at the trial before BAYLEY, J., at Dorchester, that there had been a running account between these parties, in the course of which the plaintiff had supplied the defendant with goods, and had also lent him several sums at different times, to the extent on one occasion (as it was now stated in Court) of £100; the balance of the account, however, had been paid by the defendant to the plaintiff for the goods sold and for the money lent, but not for interest on the latter, which balance the plaintiff \* had received, saving his claim for [\* 224] interest, to recover which this action was brought; and the learned Judge directed the jury to find for the plaintiff for the amount of the interest proved, which was £35; reserving the question for the opinion of the Court, whether interest was by law due or could be recovered in such a case; and the defendant's counsel had liberty to move to set aside the verdict and enter a nonsuit. This motion was accordingly made by BURROUGH in last Michaelmas Term, and a rule to show cause granted; BAYLEY, J., at the same time observing that there was no evidence of any course of dealing between the parties from whence it might be inferred that interest was tacitly agreed to be taken.

Gaselee and Moysey now showed cause against the rule, and contended that interest ran upon money lent, though there was no contract, express or implied, for that purpose; because the lender would otherwise lose the benefit which he might make of his capital, in the meantime, for the accommodation of the borrower;

No. 1.—*Calton v. Bragg*, 15 East, 224—226.

and the lender ought, in equity, to be put in the same situation as if he had applied his principal to his own use. In *Vernon v. Cholmondeley* (in 1722), Bunn. 119, the Court of Exchequer all agreed that the jury might give interest on promissory notes, bills of exchange, and for money lent. The same was held in *Blaney v. Hendricks* (in 1771, in C. P.), 2 Blac. 761, and 3 Wils. 205, where the rule for allowing interest was extended to all liquidated sums; though the balance there arose upon an account stated for money due for goods sold and delivered. Lord HARDWICKE had before allowed interest upon an account stated, in *Barwel v. Parker* (in 1751), 2 Ves. 365; and this Court gave it upon

[\* 225] \* money lent to the time of the judgment in *Robinson v. Bland* (in 1760), 2 Burr. 1077, 1085—8. In *Trelawney v. Thomas*, 1 H. Bl. 303, it was given upon money advanced for the use of another; and GOULD, J., there recognised the general rule to allow interest upon money lent both at law and in equity. 14 Vin. Abr. 458, tit. Interest C, refers, amongst many others, to a case of *Ashton v. Smith*, in 1726, where interest was decreed for the yearly balance of a renewing account. [Lord ELLENBOROUGH, Ch. J.—That looks like an agreement for interest, to be collected from the acts of the parties on prior accounts stated. But is it ever allowed except upon securities for money payable at a certain day, or by agreement, express or implied? Was it ever given upon a covenant for rent? In one case, where arbitrators had awarded it upon a sum to be paid, the Court set it aside.] In *Furquhar v. Morris*, 7 T. R. 124, it was referred to the Master to compute interest as well as principal upon a bond for a certain sum generally, without naming any certain day of payment, and though interest was not expressly reserved, which is usually done in such instruments, how, then, can it make any difference where money is lent, generally, without writing? [Lord ELLENBOROUGH, Ch. J.—The money was due on the bond immediately, no future day being given.] The recent cases of *De Havilland v. Bowerbank*, 1 Camp. 50, and *De Bernales v. Fuller*, 2 Camp. 426 (11 R. R. 755), where interest was refused, were actions for money had and received to the use of the plaintiff; but that is different from money actually lent by him to the defendant.

BURROUGH, *contra*.—There is no more reason why interest [\* 226] should run, without an agreement for that purpose, \* upon money lent, than upon money had and received, where it

No. 1.—*Calton v. Bragg*, 15 East, 226, 227.

is now admitted not to run: the difference is merely technical and verbal. In many of the earlier cases cited there must have been other circumstances, not stated in the books, from whence the Courts collected the intention of the parties that interest should run. In *Robinson v. Bland* that intention was collected from the fact of a bill of exchange having been given for the money lent, which always carries interest, though the bill was void in law. In other cases, it has been collected from the acts or declarations of the parties, or from the usage of trade. *Vide Eddowes v. Hopkins*, Dougl. 375. The MASTER OF THE ROLLS, in *Parker v. Hutchinson*, 3 Ves. 133, upon the information of Lord KENYON, in 1796, states the rule as then acted upon at Guildhall to be only to allow interest on promissory notes and other written securities for money payable at a certain day, or, as he adds in *Upton v. Lord Ferrers*, 5 Ves. 801, 803 (5 R. R. 167), payable on demand, from the day of the demand; and such has long been the general understanding.

Lord ELLENBOROUGH, Ch. J.—It is not only from decided cases, where the point has been raised upon argument, but also from the long-continued practice of the Courts, without objection made, that we collect rules of law. Lord MANSFIELD sat here for upwards of thirty years, Lord KENYON for above thirteen years, and I have now sat here for more than nine years; and during this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence \* a contract for interest [\* 227] was to be inferred, has interest been ever given. The mere form of the count cannot make any difference in this respect; for, in most cases, it happens that a plaintiff may either frame his count for money had and received, or for money lent. If interest were due in this case, why should it not also be due where goods are to be paid for at a certain day, when that time arrives, as Baron MONTAGU, in one of the old cases, is stated to have held; or in any other case, where money is to be paid at a certain day? Those cases press closely upon the present. If there were any general rule for interest to run upon money due, why should it not be allowed upon all book debts? Juries would give ear readily enough to such a direction; but I dare not vary from the practice which has long prevailed in all the Courts of Westminster Hall.

No. 1. — *Calton v. Bragg*, 15 East, 227, 228.

If it be fit that the whole course of our proceedings in respect to giving interest should be recast, it must be done by Act of Parliament. Where one directs his agent to advance money to another, what difference can it make as to the point of interest, whether he afterwards counts for money had and received, or for money lent? If interest were demandable generally upon money due, why should it have been thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid where the law would have given it without such an agreement? But, in fact, there has been no instance of its being allowed, except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it. The judgment of Lord MANSFIELD in the case of *Robinson v. Bland*, and of the eminent Judges who sat with him, shows that interest is

not due without a contract for it; for they would never  
[\* 228] have \* resorted to the argument of intention to be collected  
from the giving a void bill of exchange, in order to support the claim of interest, if the law would have given it without, upon the mere loan of money. Where a balance has been settled upon an allowance of interest in a banker's books, that is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. The cases in equity also show the understanding which has prevailed upon this subject not only in those Courts, but also in the Courts of law; as Lord ALVANLEY, when MASTER OF THE ROLLS, states, in *Parker v. Hutchinson*, that he had received the rule there laid down from Lord KENYON, as derived from the practice adopted at the sittings at Nisi Prius. It was said, indeed, in *Blaney v. Headrick* that interest is due upon all liquidated sums from the instant the principal becomes due and payable.<sup>1</sup> But those words must be taken in a restricted sense, and I must understand by them something more than an account stated. If an account be stated, and the nature of the transaction be such as to afford evidence of an agreement for interest, as if it be shown to have been allowed before upon a

<sup>1</sup> It is so stated in the report of the case in 2 Blac. 761. But the statement in 3 Wils. 206, is, that "upon an account stated between merchant and merchant it shall carry interest from the time it was liquidated;" which is more plainly referable to an implied contract by the usage of trade. See also *Pinock v. Willett*, M. 7

Geo. II., Barnes, 228, where, in an action for goods sold and delivered, the jury, upon the execution of a writ of inquiry, had allowed interest for the balance of the account due to the plaintiff; but the Court were of opinion that the inquisition should be set aside.

No. 1.—*Calton v. Bragg*, 15 East, 228-230.

prior settlement of accounts, then it may be warranted. But if it be understood as extending the claim of interest upon money lent generally, without any certain time of payment, or any agreement for interest expressed or to be implied, I \* shall [\* 229] expect a body of authorities more strong and consistent than has yet been brought forwards before I can venture to say that it is allowable by law. Hitherto it has only been allowed upon written contracts, express or implied, for the payment of interest. If it be fit that the rule should be carried further, it must be done by the Legislature.

GROSE, J.—The question is whether upon money lent generally interest is to be given? If it be, from what time is it to run: from the receipt of the money by the borrower, or from the time of the demand made by the bringing of the action? During all my experience I have never known interest given upon money lent, or upon money due for goods sold, or in any other case but upon a contract for interest expressed or implied. It is the lender's own fault if he do not contract for interest when he advances the money; but the law has long been settled as I have stated. Why should interest be paid at all without a contract for it? If there be no proof of contract, it might be given against the intention of the parties at the time of the loan. If they did not then contract for interest, it shows that they did not mean to reserve it. To allow interest, therefore, in this case, would be inconsistent with the practice which has long prevailed in Westminster Hall, and to the general understanding of mankind upon the subject: it would not be reasonable, but unjust: there is uniform usage against it, and the claim is unauthorised by law.

BAYLEY, J.<sup>1</sup>—I entirely agree with the rest of the Court. Actions for money lent are continually brought; \* and [\* 230] if any instance had occurred in which interest had been allowed, it would have been adduced; and none having been stated, shows that the constant practice has been to disallow it.

*Rule absolute for entering a nonsuit.*

<sup>1</sup> LE BLANC, J., was absent, as before.

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No. 2.—Cook v. Fowler, L. R. 7 H. L. 27, 28.

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**Cook (Appellant) v. Fowler and others (Respondents).**

L. R. 7 H. L. 27-38 (s. c. 43 L. J. Ch. 855).

*Interest. — Money payable by Written Instrument on Day certain.*

- [27] Where a written security is given for the payment of money at a certain day, with interest up to that day, and the sum secured and the interest thereon are not paid at the day, the principal and interest become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the Court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it.

Per Lord CHELMSFORD: The defeazance of a warrant of attorney is not a contract, but merely a description of the object of the security, and of the means of enforcing payment.

Per Lord SELBORNE: There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a further contract for the continuance of the same rate of interest is to be implied.

A warrant of attorney was given to secure payment of a sum of money. Its date was the 2nd day of May, 1864, and the defeazance was in these terms: "The within written warrant of attorney is given for securing the payment of the sum of £1330, with interest thereon, at and after the rate of £5 per cent. per month, on the 2nd day of June next. Judgment to be entered up forthwith." &c.

*Held*, that this was nothing more than an authority to enter up a judgment for these various sums, to be ascertained on the 2nd of June, 1864, after which time the holder would merely stand as a creditor for the sums so ascertained, and the statutable rate of interest thereon that might be allowed him by a jury or by the Court.

This was an appeal against a decision of Vice-Chancellor STUART. William Bevan, late of Stapleton, in the county of Gloucester, was indebted to Cook (among other persons), and on the 2nd of May, 1864, gave him a warrant of attorney, the defeazance of which was in the following terms:—

"The within warrant of attorney is given to secure the payment of the sum of £1330, with interest thereon at and after the rate of £5 per cent per month, on the 2nd of June next, judgment to be entered up forthwith: and in case of default in payment of the

said sum of £1330, and interest thereon, on the day afore-  
[\*28] said, \* execution or executions, and other processes may

then issue for the said sum of £1330 and interest, together with costs of entering up judgment, &c., &c., and all other inci-

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dental expenses whatever." No judgment was entered up. Bevan made his will on the 3rd of May, 1864, and made Wood and Roberts his executors and trustees; he died on the 25th of the same month, and Wood and Roberts duly proved his will. A creditor's suit for the administration of the estate of Bevan (*Robinson v. Wood*) was afterwards instituted, and the appellant came in as a creditor under that suit, but did not give any particulars of his demands against Bevan's estate. On the 11th of March, 1867, Wood and Roberts therefore filed their bill against Cook, praying for accounts, for liberty to redeem any premises comprised in securities given to him, appellant, by their testator, and then alleged to be held by him, and for costs. The appellant put in an answer on the 14th of May, 1867, in which he referred to mortgages made to him by Bevan, of certain lands in Ballin, in the county of Westmeath, and in Shire Newton, in the county of Monmouth.<sup>1</sup> He also declared his readiness to account, stated the warrant of attorney, and claimed the principal sum due under it, with interest thereon at the rate of 5 per cent per month. Both the suits came on for hearing before Vice-Chancellor STUART, and an order was made for taking the accounts. The Chief Clerk made his certificate on the 8th of March, 1869, allowing the rate of interest claimed by the appellant. On the 12th of March, Fowler, as a creditor of Bevan, took out a summons to vary the Chief Clerk's certificate, and on the 7th of July, 1869, the VICE-CHANCELLOR made an order varying it by allowing interest at 5 per cent for the month, from the 2nd of May, 1864, to the 2nd of June, 1864, after which he fixed the rate of interest at only 4 per cent per annum.

This was the order now appealed against.

Mr. E. K. Karslake, Q. C. (Mr. F. H. Daly was with him), for the appellant:—

Whenever a security is given for the payment of money with \* interest at a certain time, and payment is not then [\* 29] made, the rate of interest continues afterwards to be that which was fixed by the instrument securing it. Here is a valid instrument of security, and the particular rate of interest is settled by agreement between the parties. The appellant here had had other transactions with Bevan, and was, in fact, mortgagee of two

<sup>1</sup> All these circumstances are so fully referred to by the LORD CHANCELLOR, one portion of his judgment being ex- pressly founded on them, that it has been deemed unnecessary to set them out here at length.

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properties, one in Ireland and one in Monmouthshire, and he had also a charge on a house in Bristol. He entered into an arrangement to give up his securities on having payment made to him. That payment must be calculated on the footing of those securities. The amount of interest given in ordinary cases by the Court can only apply where there has not been any stipulated amount of interest settled by agreement between the parties. Here the amount has been expressly settled between them. The defeasance of this warrant of attorney gave to the appellant in direct and express terms the interest now claimed, and there is no rule of construction applicable to such an instrument which, either at law or in equity, requires that the appellant should accept a less rate of interest than what had so been agreed upon. Here is an express contract. There is no ground on which a Court can be called on to vary it. By the law, as it now stands, any person is entitled to contract to pay any rate of interest, and such a contract is perfectly valid. If the time at which the principal of any money bearing interest ought, by the terms of a written contract, to be paid, is allowed to expire without payment, the party entitled to the payment may, in an action for the principal, recover the same interest from the date of the last payment of it: *Price v. Great Western Railway Company*, 16 M. & W. 244. That case shows that where nothing is said of future interest it will continue as of course; and Mr. Baron PARKE gave in that case the reason for the rule, saying: "Because the deed shows the intention of the parties that it should be a debt bearing interest." That rule had previously been adopted in *Atkinson v. Jones*, 2 Ad. & El. 439, which was the case of a warrant of attorney, given by a third person to secure the due payment of interest on a debenture; the Court would not interfere to enter satisfaction upon the roll, it not being sufficiently clear from the defeasance that the warrant of attorney was intended to cover only the interest [\* 30] up to the day named. \* So that the Court must have considered that the warrant of attorney would cover the same interest accruing after the day named. [The LORD CHANCELLOR. Suppose a promissory note, payable twelve months after date, but not paid at the time, what interest would be given on it by the jury?] That which had been stipulated for between the parties. If they had fixed the interest at 3 per cent, of course it would not be increased; if they had fixed the interest at 6 per cent

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or more, that would be given — it would not be diminished ; “ the intention of the parties,” as Mr. Baron PARKE said, would afford the guide. Here the rate of interest had been expressly agreed upon.

Mr. Dickinson, Q. C., and Mr. Hemming for the respondents :—

Interest may now, of course, be stipulated for to any amount the contracting parties think fit ; but if stipulated for up to a certain time, the liability to pay that interest does not go on continuously. The interest, as interest, ceases at the time mentioned. If the contract is not performed at the time, the amount recoverable, in addition to that stipulated for, is recoverable not as continuing interest, but as damages for breach of the contract to pay. Now, those damages are not necessarily to be measured by the *quantum* of the interest agreed upon by the parties themselves. The statute 3 & 4 Will. IV., c. 42, s. 28, which gives to a jury the power to assess damages for non-payment of money, expressly says that the jury may give such damages “ if they shall think fit ; ” so that, so far from being obliged to give them, and to measure them by the amount of interest secured by the instrument, they may refuse the damages altogether. This case does not come within those referred to on the other side. The debenture in *Price v. The Great Western Railway Company* was declared to be a mortgage. A warrant of attorney is not a mortgage, it is a personal contract to secure payment of a debt, and in this instance that debt was to be paid, with stipulated interest upon it at a time certain. If not paid then, the contract was broken, and all that could afterwards be recovered would be damages for the breach of it. In a note to *Mounson v. Redshaw*, 1 Wm. Saund. 201 n.; see also *In re Kerr's Policy*, L. R. 8 Eq. 331, it is shown that interest even upon a mortgage deed, accruing after the day fixed in the deed, does not \* become part of the debt, but is to be treated as [\* 31] damages for the detention of the debt. An excessive amount of interest submitted to for a time upon particular pressure is certainly not a thing which, contrary to all legal analogies, the Courts would continue upon mere implication. The money claimed after the day stipulated, not being interest as stipulated, must be in the discretion of the Court, and must be that which the statute, or the rules of practice, would prescribe.

Mr. Karslake in reply :—

The warrant of attorney here, though it may not be a mortgage, is equivalent to a charge, by the debtor on his land, and may

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be treated as an equitable mortgage. It cannot be argued that, because the judgment was not entered up at the end of the month, the instrument ceased to be a security at all. Yet, if not so argued, it is a valid and still subsisting security for the money mentioned in it according to the mode there mentioned, both as to principal and interest. If this instrument had only given interest at 6 per cent, no Court would have reduced that amount to 5 per cent. Then, on what principle can it be reduced now?

The LORD CHANCELLOR (Lord CAIRNS), after stating the facts of the case, said:—

So far as the literal construction of that warrant of attorney and defeazance goes, your Lordships will observe that there is no notice of any contract of debt, or of any contract for forbearance of money for any length of time beyond the time specified upon the face of the defeazance. It is an authority to enter up judgment, and a stipulation that execution is only to issue in one way and for one purpose. It is to issue on the 2nd of June following the date of the warrant of attorney, — it is to issue then “in default of payment of £1330, and interest thereon,” which, of course, means the interest stipulated at the rate of 60 per cent “on the day aforesaid,” — that is, on the 2nd of June; and then in that case “execution and other process may issue for the said sum of £1330 and interest” (which, of course, must necessarily mean interest at that rate and due up to that day), “together with the costs of

entering up judgment, registering the same, and writ and [<sup>\*32]</sup> writs \* of execution or executions, sheriffs’ poundage,” and

so on. Therefore, taking the literal construction and effect of this warrant of attorney and defeazance, it would appear to me to amount to an authority to issue execution on the 2nd of June for one total sum, which is to be composed of the principal sum of £1330, interest at 60 per cent up to the 2nd of June, and those expenses, unascertained in the first instance, but to be ascertained at the time described, as expenses of sheriffs’ poundage, and other matters of the same kind.

My Lords, it appears to me that, upon the literal construction of this instrument, it is nothing more than an authority to enter up a judgment, which would be substantially a judgment for those various sums, their amount to be ascertained on the 2nd of June, 1864; and that then, if execution is not levied at that time, and payment is not at that time enforced under the execution, the

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judgment creditor would stand from that time forward as a creditor for the sum for which he might then have levied, together with the ordinary statutable rate of interest upon that sum,—namely, the rate of 4 per cent.

My Lords, if that view should be adopted (and it appears to me that it might safely be adopted in this case), there would be no necessity to go further. But I will ask your Lordships to consider also the alternative view by which, I think, the same conclusion will be arrived at. If this is not merely a judgment for the principal sum and the amount of interest, and costs up to the 2nd of June, which judgment is thenceforward to bear interest at the rate of 4 per cent, it is, at all events, a warrant of attorney and defeazance which is given to secure a debt of £1330 with interest up to a certain day, and without any mention of subsequent interest upon the face of the instrument. If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson v. Redshaw*, 1 Wm. Saund. 201 *n.*, any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and \* the sum which [\* 33] properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest; but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

Apply that to the present case, and let me ask your Lordships to look for a moment at the very peculiar circumstances of the present case. This warrant of attorney and defeazance or judgment was given by William Bevan on the 2nd of May, 1864. He died on the 25th of the same month, which was before the time stipulated for the payment of the principal sum with the high rate of interest, namely, the 2nd of June. It appears that his executors were not aware of this warrant of attorney, or of the stipulations in the defeazance. On the 11th of June, a few days after his death, an administration suit was instituted, the suit of

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*Robinson v. Wood*; and on the 25th of June the usual decree was made in that suit for the administration of the estate of the testator. On the 4th of July, 1864, the present appellant, Cook, filed a bill — the suit of *Cook v. Wood* — as a judgment creditor and mortgagee of the testator, alleging, what was the fact, that he had various claims against the testator as a mortgagee, and in other characters, but giving no specification and no particulars with regard to this warrant of attorney and defeazance. Finding that he was asserting rights as a creditor generally, the executors adopted the usual course. He was served with a notice of the decree in *Robinson v. Wood*, which, of course, stayed his own suit; but he did not come in and prove his debt, or explain the character of the security which he held. On the 11th of March, 1867, that is to say, after Cook had lain by for nearly three years, the executors, inasmuch as he had not come in under the suit and claimed to have securities as a mortgagee, were forced to file a bill against him, which is the bill in *Wood and Roberts* (the executors of Bevan) v. *Cook*. That bill was filed on the 11th of March, 1867; it was a bill for an account, and to redeem whatever securities he might hold, the plaintiff's alleging that

[\* 34] Cook would not \* disclose the particulars of his securities.

On the 14th of May, 1867, Cook put in his answer in that suit, and referred to the judgment which had been entered up under this warrant of attorney, but referred to it in general terms, without giving any details as to the rate of interest which he claimed to be running on under the warrant of attorney. On the 12th of June, 1868, an agreement was come to between Cook and the executors, who were still without information as to the details of this defeazance. By that agreement, although the time for proving debts in the first suit of *Robinson v. Wood* had passed, Cook was to be admitted to come in as a creditor in *Robinson v. Wood* for whatever might be found to be due to him. Under that agreement, on the 28th of November, 1868, that is to say, more than four years after the death of Bevan, an affidavit was filed by Cook, for the first time giving the particulars of this warrant of attorney and defeazance, upon which his case now rests, and upon which he claims that interest had been running on during the whole time at the rate of 60 per cent.

Now, my Lords, if this is to be judged of (and it is the most favourable view of the case that can be taken on behalf of the

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appellant that it should be so judged of) as a case in which Cook is coming and claiming damages for the non-payment of a debt due to him on the 2nd of June, 1864, it appears to me to be clear that any tribunal judging of that claim for damages would be bound to take into account the circumstances to which I have referred — circumstances which show that Cook was endeavouring to prevent the character of this defeazance from transpiring — that he was endeavouring to keep back his security, and thereby to become entitled to claim this high rate of interest, whereas it is obvious that if he had at the first disclosed the nature of the claim in respect of interest which he was prepared to allege, steps would have been taken to pay off the principal sum that was due to him.

Therefore, whether your Lordships take it as a judgment for a specific sum, bearing no interest beyond the statutable interest of 4 per cent, or whether you take it as a claim for damages for the detention of a debt, in either case it appears to me to be out of \* the question that the rate of 60 per cent could be [\* 35] allowed. It appears to me that in the first view the rate of 4 per cent is the rate absolutely assigned by statute upon the payment of judgment debts; and, in the second case, it is for the tribunal to fix the rate of damages. It is possible that the rate of 5 per cent might be given by a jury, or by a Judge who was performing the functions of a jury; but the primary Judge having in this case only given the usual rate assigned in the Court of Chancery, namely, 4 per cent, I certainly do not propose to advise your Lordships to disagree with that opinion at which he has arrived, but, on the contrary, I advise and move your Lordships that this appeal should be dismissed with costs.

Lord CHELMSFORD:—

My Lords, I think the order of Vice-Chancellor STUART refusing the appellant interest at the rate of 5 per cent per month after the 2nd of June, 1864, and allowing him interest at 4 per cent per year from that day, is right, and ought to be affirmed.

There is no authority that I can find to support the argument of the counsel for the appellant, that where a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards. On the contrary, the distinction seems to be well established between cases where

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the interest is expressly reserved in the instrument, and where it is not. In the latter case it is recoverable, not as interest according to the contract, but as damages for the breach of it.

In the present case there is, properly speaking, no contract. The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security and of the means by which the judgment creditor, in case of the debtor's default, may enforce payment of the sum secured. That sum in the present case is £1330, with interest at and after the rate of £5 per cent per month on the 2nd of June. If the judgment had been entered up on that day upon the default of payment, execution might have been issued immediately for the principal sum and interest at the rate specified. Or the appellant might have brought his [\*36] action upon the judgment, and might have \* recovered further interest, not as interest *eo nomine*, but by way of damages.

The appellant, by delaying to enter up judgment, cannot place himself in a better position than if he was a judgment creditor. And as he would then, according to the practice of the Court, have been allowed interest only at 5 per cent, so the allowance by the VICE-CHANCELLOR of that rate of interest after the 2nd of June, 1864, is as much as he is entitled to.

Lord HATHERLEY:—

My Lords, I entirely concur with the judgment which has been proposed to your Lordships, and in the opinions which have been expressed by the two noble and learned Lords who have preceded me.

The question as to whether interest should be calculated at the rate mentioned in the original warrant of attorney resolves itself simply into this: Is there or is there not any contract after the day upon which judgment was to be entered up for the payment of any specific sum and interest? The cases which were cited with reference to mortgages show clearly that the interest, after a given day, upon which day the principal and interest secured by the mortgage were made payable, can only be given in the nature of damages. Among the numerous cases which may be cited, in which this point has been fully discussed, I will just take leave to refer your Lordships to one, because it contains some observations of Mr. Justice BAYLEY, which seem to me to be peculiarly applicable to this case. The case to which I refer was the case

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of *Cameron v. Smith*, 2 B. & Ald. 305 (20 R. R. 444). The simple point in that case was whether or not a petitioning creditor's debt in bankruptcy could be supplemented by adding interest to his debt (which the Commissioners had done) when there was no express stipulation for interest, and it was there held that that could not be done, because the Commissioners had no power to award damages after the bankruptcy, and as any interest that could be allowed would have to be allowed by way of damages and not by way of interest, it was beyond the province of the Commissioners. In considering the \* case [\*37] Mr. Justice BAYLEY makes these observations: "Although, by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount; and it is competent for them either to allow 5 per cent or 4 per cent, according to their judgment of the value of money; or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder" — that is, the holder of the instrument.

My Lords, I think that in this particular case the appellant could not put his case higher than the two ways in which it has been put by my noble and learned friend on the woolsack; namely, to treat the case either as a judgment actually entered up, which it was not, or else as a claim to damages in consequence of the default of payment, and in that case really it would only come within the ordinary rule of the Court of Chancery, which is to allow interest at the rate of 4 per cent.

Lord SELBORNE: —

My Lords, unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied, the decision of the VICE-CHANCELLOR in this case is not erroneous.

I entirely agree with those of your Lordships who have preceded me, that no such contract is to be implied, unless there is something to justify it, upon the construction of the words of the particular instrument; and that, although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of

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contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a Court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be

[\* 38] presumed would have been the same whatever might be the duration \* of the loan, has been agreed to. But in the case before your Lordships the agreed rate of interest is excessive and extraordinary; and, although no question is raised between the present parties as to its fairness or reasonableness, so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time. In my opinion, no Court or Judge could, under the particular circumstances of this case, have adopted that rate of interest as a proper measure of damages, without a very great miscarriage of justice.

I entirely agree in the motion which my noble and learned friend upon the woolsack has submitted to your Lordships.

*Order appealed from affirmed and appeal dismissed with costs.*

Lords' Journals, 15th May, 1874.

#### ENGLISH NOTES.

Among the cases which affirm the earlier part of the rule may be mentioned *Page v. Newman* (1829), 9 Barn. & Cress. 379, 4 Man. & Ry. 305, *In re Gosman* (C. A. 1881), 17 Ch. D. 771, 50 L. J. Ch. 624, 45 L. T. 267; *London, Chatham, & Dover Railway Co. v. South Eastern Railway Co.* (H. L. 1893), A. C. 429, 63 L. J. Ch. 93, 69 L. T. 637; s. c. (C. A. 1892), 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. 722.

The contract to pay interest might, prior to the 3 & 4 Will. IV., c. 42 (sometimes called Lord Tenterden's Act), have been implied. A contract was so implied where there was an agreement to give a bill of exchange, and the interest would run from the time when the bill would have become due. *Marshall v. Poole* (1810), 13 East, 98, 12 R. R. 310. The interest in this case might have been recovered under a count for goods sold and delivered: s. c.; *Farr v. Ward* (1837), 3 M. & W. 25, 6 Dowl. P. C. 163, Murphy & H. 274; or on a count for the non-delivery or non-payment of the bill: *Slack v. Lowell* (1810),

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3 Taunt. 157. In *Davis v. Smith* (1841), 8 M. & W. 399, 10 L.J. Ex. 473, the defendant wrote to the plaintiff: “The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market, just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself.” This was held to be evidence to go to the jury of an agreement to pay for goods by a bill or note, and that the jury were warranted in giving interest as part of the plaintiff’s claim. So in *Rhoades v. Lord Selsey* (1840), 2 Beav. 359, a contract to pay interest was inferred from the terms of a letter offering to give a note.

In the case of contracts of indemnity, whether express or implied, by a principal to a surety, the surety is entitled to interest on the sums which he actually pays on the principal’s behalf. *Petre v. Duncombe* (1851), 2 L. M. & P. 107, 20 L. J. Q. B. 242, 15 Jur. 86; *Ex parte Bishop, Re Fox* (C. A. 1880), 15 Ch. D. 400, 50 L. J. Ch. 18, 43 L. T. 165.

The statutory enactment (3 & 4 Will. IV., c. 42, s. 28), is in the following terms: “Upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law.” By section 29 of the same statute a jury may award “damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after” the 14th August, 1833.

The express terms of section 29 make it clear that the sum awarded by the jury is in the nature of damages, but in *Webster v. British Empire, &c. Co.* (C. A. 1880), 15 Ch. D. 173, 49 L. J. Ch. 763, 43 L. T. 229, 25 W. R. 818, all the members of the Court of Appeal expressed their opinion that the sum awarded under section 28 was equally in the nature of damages. Prior to the statute, where interest was recoverable, it would seem that where it was not paid in compliance with the terms of an express stipulation the interest was in the nature of damages. ¶ Wm. Saund. 204 note (t), and the authorities cited in argument in

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*Attwond v. Taylor* (1840), 1 Man. & G. 279, 317, 1 Scott N. R. 611. The point here mentioned, although technical, may not altogether have lost its importance in respect of attempts to sign summary judgment under Order 14, rule 1, of the Rules of the Supreme Court. Unless the plaintiff shows by his indorsement that the claim for interest arises upon some contract, or under some other authority giving him an absolute right to the interest, as would be the case in an action on an overdue bill of exchange, the claim is not a liquidated claim, and the writ is not specially indorsed: *Willis v. Wood* (C. A. 1892), 1 Q. B. 684, 61 L. J. Q. B. 516, 66 L. T. 520; *Lawrence v. Willocks* (C. A. 1892), 1 Q. B. 696, 61 L. J. Q. B. 519, 66 L. T. 511.

The words "sums certain" in section 28 would not extend to sums which might be ascertained by calculation. *London, Chatham, & Dover Railway Co. v. South Eastern Railway Co.* (C. A. 1892), 1 Ch 120, 61 L. J. Ch. 294, 65 L. T. 722. This appears a stricter construction than has been given to the words "at a certain time" in a later part of the clause. In the common case of a covenant in a marriage settlement to pay a sum certain within a limited time after the death of the covenantor, the covenant has been construed as involving a payment within a certain time so as to make interest payable from the expiration of the time named after the death. *Re Horner, Fooks v. Horner* (1896), 1897, 1 Ch. 188, 65 L. J. Ch. 694, 74 L. T. 686, 44 W. R. 556.

In founding a claim to interest upon the section, the amount of the indebtedness may be referred to in general terms. *Mildmay v. Methuen* (1854), 3 Drew. 91; *Geake v. Ross* (1875), 44 L. J. C. P. 315, 32 L. T. 666.

The claim to interest where not due by express agreement should be put forward in a clear manner. Thus a statement that a third person considers that the creditor should claim interest is not sufficient. *Ward v. Eyre* (C. A. 1880), 15 Ch. D. 130, 49 L. J. Ch. 657, 43 L. T. 525. So a printed statement in a bill-head that interest would be charged after the lapse of a certain time is not sufficient. *Re Edwards, Williams v. French* (1891), 61 L. J. Ch. 22, 65 L. T. 453. But a statement that the creditor would expect interest from a time specified is sufficient. *Lord Londesborough v. Mowatt* (Ex. Ch. 1854), 4 El. & Bl. 1, 23 L. J. Q. B. 38, 18 Jur. 1094. A solicitor may be allowed interest on his disbursements by the Attorneys and Solicitors Act, 1870 (33 & 34 Vict., c. 28), s. 17. This enactment is not retrospective: *Ward v. Eyre, supra*; and does not apply where the costs are to be paid out of a fund in Court: *Hartland v. Murrell* (1873), L. R. 16 Eq. 285, 43 L. J. Ch. 94, 28 L. T. 725, 21 W. R. 781. A solicitor is not entitled to appropriate sums received generally on account to costs for which he

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has not delivered a bill, in order to claim interest on his disbursements: *In re Harrison* (1886), 33 Ch. D. 52, 50 L. J. Ch. 768, 55 L. T. 72, 34 W. R. 645. By the joint effect of the Solicitors Remuneration Act, 1881 (44 & 45 Vict., c. 44), s. 5, and reg. 7 of the General Order made thereunder, a solicitor may “charge interest at the rate of 4 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.” The delivery of the bill is a sufficient demand to entitle the solicitor to interest. *Blair v. Corderer* (1887), 19 Q. B. D. 516, 56 L. J. Q. B. 642, 36 W. R. 109. This was decided by one division of the Court of Appeal sitting as a Divisional Court after consulting the members of the other division. The Act and order do not apply where the solicitor is entitled to be paid out of a fund in Court in an administration action. *Re Marsden's Estate*, *Withington v. Newmann* (1889), 40 Ch. D. 475, 58 L. J. Ch. 260, 60 L. T. 696, 37 W. R. 525. The 17th section of the Judgments Act, 1888 (1 & 2 Vict., c. 110), is to the following effect: “Every judgment debt shall carry interest at 4 per cent per annum from the time of entering up the judgment” until satisfaction. And by section 18: “All decrees or orders of Courts of equity, and all rules of Courts of common law, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the Superior Courts of common law, . . . and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.” The interest given now runs, if the judgment is pronounced in Court, from that date, otherwise from the date of entering up. R. S. C. 1883, Ord. XLI, rr. 3 and 4; Ord. XLII, r. 16. The Act does not apply to County Court judgments. *Reg. v. Essex County Court Judge* (C. A. 1887), 18 Q. B. D. 704, 56 L. J. Q. B. 315, 57 L. T. 643, 35 W. R. 511. It has also been held that the judgment debtor may by the terms of a covenant be bound to pay interest at a higher rate than 4 per cent. *Popple v. Sylvester* (1882), 22 Ch. D. 98, 52 L. J. Ch. 54, 47 L. T. 329, 31 W. R. 116.

The liability to pay interest in respect of a policy of assurance only arises where there is a person capable of giving a valid discharge for the whole of the sum assured. *Webster v. British Empire, &c. Co.* (C. A. 1880), 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. 229, 28 W. R. 818; *Curtius v. Caledonian, &c. Co.* (C. A. 1881), 19 Ch. D. 534, 51

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L. J. Ch. 80, 45 L. T. 662, 30 W. R. 125. In *Phillips v. Homfray* (C. A. 1892), 1 Ch. 465, 61 L. J. Ch. 210 (cited 2 R. C. 8), a point arose regarding the payment of interest on a sum recovered in an action brought for the wrongful working of minerals. The action was brought against two wrongdoers, and the personal representatives of a third. By the decree, an inquiry as to damages suffered was directed, but the decree was silent as to interest. Pending the inquiry, another of the defendants died, and the suit was revived against his personal representatives. More than twenty years after the decree a claim for interest was put forward on the ground that the action was one of trover or trespass *de bonis asportatis*, but interest was refused on the ground that having originally sued a legal personal representative and revived the action against another, the action was neither trover nor trespass *de bonis asportatis*, which would have died with the person; that by the form of the decree the action could not be treated as one for money had and received, but must be treated as an equitable action for an account, and that the plaintiff was barred by his laches from claiming interest. So where a reference to taxation was silent as to interest, the claim of interest was disallowed. *Berrington v. Phillips* (1836). 1 M. & W. 48, 5 L. J. Ex. 127.

The discretion of the jury to award interest by way of damages is absolute. *Attwood v. Taylor* (1840), 1 Man. & G. 279, 1 Scott N. R. 611. In cases of legal claims arising in the Court of Chancery, the Judge will exercise the functions of a jury. *Hyde v. Price* (1837), 8 Sim. 579; *Attorney-General v. Ludlow Corporation* (1849), 1 Hall & T. 216. Here, however, the Court of Appeal will review the judgment of the Court below, if the allowance has proceeded on some error of principle. See *Webster v. British Empire, &c. Co.* (C. A. 1880), 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. 229, 28 W. R. 818; *London, Chatham, & Dover Railway Co. v. South Eastern Railway Co.* (H. L. 1893), A. C. 429, 63 L. J. Ch. 93, 69 L. T. 637.

There is no such thing as a fixed rate, where interest can be claimed upon implied contract or by way of damages. *London, Chatham, & Dover Railway Co. v. South Eastern Railway Co.* (C. A. 1892), 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. 722. Where the rate is not expressed, it is for the jury under the directions of the Court to say at what rate the interest should be allowed. *Gibbs v. Fremont* (1853), 9 Ex. 25, 22 L. J. Ex. 302. In that case the Court sanctioned 25 per cent in the case of a dishonoured bill drawn in California, payable at Washington.

In *Horsant v. Blaine* (C. A. 1887), 56 L. J. Q. B. 511, an action for money had and received was brought in the Queen's Bench Division by a principal against his agent. It was objected that the agent could not be charged with interest, but the Court fixed the agent with liability

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ity for interest from the time when the principal had called for payment. The grounds upon which the Court proceeded were that in equity the agent would have been charged with interest in an action of account: *Pearse v. Green* (1819), 1 Jac. & W. 135, 20 R. R. 258; that his liability, as regards principal moneys, would have been the same in the one form of action as in the other; and that there was a “conflict or variance between the rules of equity and the rules of the common law with reference to the same matter,” and that the equitable rule giving interest must be applied by reason of section 25 (11) of the Judicature Act, 1873 (36 & 37 Vict., c. 66).

It seems to have been the practice of a Court of error to allow interest upon the affirmance of a judgment in the Court below. *Becher v. Jones* (Ex. Ch. 1810), 2 Camp. 228 *n.*, 11 R. R. 756; *Middleton v. Gill* (1812), 4 Taunt. 298, 13 R. R. 595. A similar rule, it is conceived, still obtains by reason of the statutory provisions of the Judgments Act, (1 & 2 Vict., c. 110), s. 17, set out above, in the case of an affirming of a judgment by a Court of Appeal.

## AMERICAN NOTES.

That interest was not allowed at common law is recognized in this country. *Pekin v. Reynolds*, 31 Illinois, 529; 83 Am. Dec. 244; *Houghton v. Page*, 2 New Hampshire, 42; 9 Am. Dec. 30. In the latter case the Court said: “The prejudices on this subject have doubtless been embittered by the circumstance that anciently Jews were the principal money-lenders; and such is still the extent of those prejudices as hardly to be accounted for, except on the belief that interest is prohibited by the Scriptures as a moral offence, or that associations are continued, which have some connection with the fulfilment of propheey against the persecuted race of Israel. Even as late as the reigns of Henry VII., of Edward VI. and of Mary, when literature had so long waked from her slumbers that some correct views in political science would naturally dawn upon the world, every rate of interest was forbidden by express statute. It therefore follows, that if the common law of England concerning interest should be adopted, we must hold void all contracts for any quantity of interest, however small and reasonable. But in this enlightened age such a rule could no more be tolerated than the absurd principles of the common law concerning witchcraft and heresy. There can be in force here only those principles of the common law which have been expressly adopted, or which, being applicable to our state of society and of jurisprudence, and founded upon axioms of intelligent reason, may be considered as impliedly binding.”

Interest is allowed by the statutes of all the United States, and is generally a creature of statute, and only allowed where so authorized. *Pekin v. Reynolds*, *supra*; *Supervisors v. Chickasaw Co. Supervisors*, 61 Mississippi, 531; *State v. Farrier*, 47 New Jersey Law, 383; *Randall v. Greenhood*, 3 Montana, 506; *Duver, &c. R. Co. v. Conway*, 8 Colorado, 1. But where there was an account stated, the fact that there was no statute allowing interest at the

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place where the transaction took place and the account was stated was held not to preclude the recovery of interest, at the rate according to custom, by way of damages. *Young v. Godbe*, 15 Wallace (U. S. Sup. Ct.), 562.

Interest is allowable as damages for default in the performance of a contract to pay money. *Young v. Godbe*, 15 Wallace (U. S. Sup. Ct.), 562; *Buzzell v. Snell*, 25 New Hampshire, 474; *West Republic, &c. Co. v. Jones*, 108 Penn. State, 55; *People v. New York County*, 5 Cowen (N. Y.), 331; *Dodge v. Perkins*, 9 Pickering (Mass.), 369; *Chicago v. Tibbets*, 104 United States, 120. And in the discretion of the jury, as damages, in actions for negligence. *Ell v. Northern Pac. R. Co.*, 1 North Dakota, 336; 12 Lawyers' Rep. Annotated, 97.

In actions for breach of contract the allowance of interest is a question of law for the Court, but in actions sounding in tort it is generally a question for the jury. *Mansfield v. N. Y. Cent. & H. R. R. Co.*, 114 New York, 331; 12 Lawyers' Rep. Annotated, 566.

Interest is generally not allowed on unliquidated contractual demands in the absence of an express or implied agreement to pay it. *Palmer v. Stockwell*, 9 Gray (Mass.), 237; *McMahon v. N. Y. &c. R. Co.*, 20 New York, 463; *Crosby v. Mason*, 32 Connecticut, 482; *McClintock's Appeal*, 29 Penn. State, 360; *Marsh v. Fraser*, 37 Wisconsin, 149. And so of a demand for damages for breach of warranty on sale of goods. *Lewis v. Rountree*, 79 North Carolina, 122; 28 Am. Rep. 309.

But interest is allowable on an unsettled account from a reasonable time after it becomes due: *Bates v. Starr*, 2 Vermont, 536; *Wiles v. Brown*, Pennington (3 New Jersey Law, 538); and if an amount is capable of ascertainment, it is considered liquidated: *Graham v. Chrystal*, 1 Abbott Practice, N. S. (N. Y.), 121; *Mansfield v. N. Y. Cent. & H. R. R. Co.*, *supra*. And interest is allowable, in an action of damages for destruction of property by negligence, on the damages, from the time of destruction. *City of Allegheny v. Campbell*, 107 Penn. State, 533; 52 Am. Rep. 478. So in an action for breach of contract to hire rooms for a certain time, at an agreed price, interest must be awarded on the recovery. *De Lavallette v. Wendt*, 75 New York, 579; 31 Am. Rep. 494. So in an action of covenant for rent, interest is allowed as matter of law from the time the rent fell due, although it was payable in wheat and services, the value of which was unliquidated by the contract. *Van Rensselaer v. Jewett*, 2 New York, 135. In this case BRONSON, J., stated the principles as follows: "Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the Courts for redress, he ought, in all such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement, like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done, the creditor, as a

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question of principle, is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money. The English Courts do not allow interest in such cases; and I feel some diffidence in saying that it can be allowed here, without the aid of an Act of the Legislature to authorize it. But the Courts in this and other States have for many years been tending to the conclusion which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money, or in anything else, shall indemnify the creditor, so far as that can be done by adding interest to the amount of damage which was sustained on the day of the breach." So in an action on the case for injury to property, interest was allowed from the day of the injury. *Chicago, &c. R. Co. v. Shultz*, 55 Illinois, 421; *Dean v. Chicago & N. W. Ry. Co.*, 43 Wisconsin, 305.

Interest is not recoverable in an action of damages for breach of warranty on a sale of seed. *White v. Miller*, 78 New York, 393; 34 Am. Rep. 544. But a jury, in its discretion, may allow interest, where the value of property is diminished by a wrongful injury, upon the amount of the diminution of value. *Wilson v. City of Troy*, 135 New York, 96; 31 Am. St. Rep. 817; 18 Lawyers' Rep. Annotated, 449. The Court observed: "When interest may be allowed as part of the damages in actions of this character is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the Courts are not harmonious. It is perhaps impossible to formulate a general rule embracing every possible case. The tendency of Courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles however established by the decisions in this State, which, when properly applied, will aid in the solution of the question. There is of course a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions, there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this Court, and principles stated that will furnish a guide in most cases. *White v. Miller*, 78 N. Y. 393; 34 Am. Rep. 544.

"We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass *de bonis asportatis* was given first in England by statute 3 & 4 William IV. The recovery was not however allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this State followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases. *Beals v. Guernsey*, 8 Johns. 446; 5 Am. Dec. 348; *Hyde v. Stone*, 7 Wend. 354; 22 Am. Dec. 582; *Bissell v. Hopkins*, 4 Cow. 53; *Rowley v. Gibbs*, 14 Johns. 385.

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"The principle that the right to interest in such cases was in the discretion of the jury was however gradually abandoned, and now the rule is, that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as matter of law. The reason given for the rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages is not any more in the discretion of the jury than the value. *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 315; *Buffalo, &c. Co. v. Buffalo*, 58 N. Y. 639; *Parrott v. Knickerbocker, &c. Ice Co.*, 46 N. Y. 369. It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse, and a case where through negligence on his part the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this State the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. *Thomas v. Weed*, 14 Johns. 255.

"We think the rule is now settled in this State, that where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. 1 Sedgwick on Damages, 8th ed., secs. 317, 320; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Manhattan R. E. Ass'n*, 89 N. Y. 498; *Duryee v. Mayor, &c.*, 96 N. Y. 477, 479; *Home Ins. Co. v. Pennsylvania R. Co.*, 126 N. Y. 671; *Penn., &c. R. Co. v. Ziemer*, 124 Pa. St. 560.

"There is a class of actions sounding in tort in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, &c. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, &c. And still a third class, in which interest cannot be recovered as of right, but may be allowed, in the discretion of the jury, according to the circumstances of the case."

The law implies a contract to pay interest where such is the usage of trade, or the course of dealing between the parties, or the special custom of the creditor known to and acquiesced in by the debtor. *Sellick v. French*, 1 Connecticut, 32; 6 Am. Dec. 185; *Williams v. Craig*, 1 Dallas (Pennsylvania Sup. Ct.), 313; *Koons v. Miller*, 3 Watts & Sergeant (Penn.), 271; *Mech v. Smith*, 7 Wendell (N. Y.), 315; *Fisher v. Sargent*, 10 Cushing (Mass.), 250; *Ayers v. Metcalf*, 39 Illinois, 307; *Esterly v. Cole*, 3 New York, 502.

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No. 3. — Burdick v. Garrick, 39 L. J. Ch. 369. — Rule.

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No. 3. — BURDICK *v.* GARRICK.

(CH. APP. 1870.)

RULE.

WHERE a trustee has mixed up trust funds with his own, he will be charged with simple interest at the rate assumed by the Court to be the ordinary rate of interest. Compound interest will only be given when it is proved that he has employed the money in trade such as ordinarily produces profit upon the capital employed.

**Burdick v. Garrick.**

39 L. J. Ch. 369-374 (s. c. L. R. 5 Ch. 233; 18 W. R. 387).

*Principal and Agent.* — *Trustee.* — *Solicitor.* — *Interest.* — *Employment* [369] *of Trust Funds in Trade.*

An agent who is empowered to retain in his own hands his principal's money for the purpose of investment is a trustee for his principal, and cannot set up the Statute of Limitations as a bar to a suit for an account.

A gentleman resident in America by power of attorney authorised two persons in England, one of whom was a solicitor, to get in and sell his property here and reinvest the proceeds, and generally deal with it for his benefit. He died intestate in 1859, whereupon the agents paid the moneys which they had then received under the power, and which had not been reinvested, into a bank to the account of the firm of which the solicitor was a member. In 1867 letters of administration were taken out to the intestate by his widow, who filed a bill against the agents for an account. *Held*, that the agents were trustees for their principal, and could not set up the Statute of Limitations against his personal representative.

*Semble* (per Lord HATHERLEY, L. C.), that, if the agents were not trustees, inasmuch as the agency was continuing at the death of the principal, no debt accrued till after that time, and therefore the Statute of Limitations did not begin to run until letters of administration were taken out to his estate and effects.

When a trustee has employed trust funds for his own benefit, he will be charged as of course with simple interest at 5 per cent.

But compound interest will only be given when it is proved that the money has been used in trade, and the payment by a solicitor of it into his bank to the general account of his firm is not such an employment of the money in trade as to make him liable to be charged with compound interest. *Quare*, whether it can under any circumstances be given unless a case is made out for it on the bill.

A married woman filed a bill as administratrix by her next friend, making her husband a co-defendant. *Held*, that although a demurrer to the bill by the

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No. 3.—**Burdick v. Garrick, 39 L. J. Ch. 369, 370.**

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other defendants would have been successful, the cause having come to a hearing, the Court would not then allow the objection, but would order the husband to be made a co-plaintiff, and payment to be made to the husband and wife.

Percival Egerton Garrick, being at the time resident in the United States, on the 7th of June, 1858, executed a power of attorney, whereby he authorised the defendants, David Garrick and John Braddick Monckton, to sell and convert into money his real and personal estate in England, and either to transmit the proceeds to him or invest them in real or personal securities, either in his name, or in the name or names of any person or persons in trust for him.

In pursuance of this power, the defendants, Garrick and Monckton, sold both real and personal estate belonging to P. E. Garrick: they transmitted a portion of the proceeds to him, but at the time of his death, which occurred on the 11th of November, 1859, they still retained in their own hands a considerable sum for which they had not accounted.

In the month of January, 1860, the solicitors of the above-named defendants received a letter from the plaintiff's solicitor informing them that she was the widow of Mr. P. E. Garrick, and requiring an account of his estate. To this letter an answer was returned, declining to recognise any person other than the legal personal representative of Mr. P. E. Garrick.

On the 24th of October, 1867, letters of administration to the estate of Mr. P. E. Garrick were taken out by the plaintiff; on the 25th the solicitor again wrote to Messrs. Monckton & Co., the solicitors of the defendants, demanding an account, and on the 4th of February the plaintiff, who had married again since the death of her first husband, Mr. P. E. Garrick, filed the bill in this suit by her next friend, and made her husband, Loron Burdick, a defendant.

The plaintiff by her amended bill charged that the pro-[\*370] ceeds of the sale of \*her late husband's property had been

received by the defendant, John Braddick Monckton, and had ever since been employed by Messrs. Monckton & Co. (of which firm he was a member) in carrying on their business of solicitors, and that thereby large profits had been made. The bill asked for payment to the plaintiff of what, on taking the accounts, should be found due from the defendants, Garrick and Monckton, and of the costs of the suit.

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The defendant, J. B. Monckton, admitted by his answer that the moneys received by him by virtue of the power of attorney had been paid to the general account of his firm at the London and Westminster Bank, as was their custom with regard to all moneys received by them on behalf of clients, but he denied that in any other sense or way had he or his firm made any profits therefrom.

Both the defendants, Garrick and Monckton, denied that the plaintiff was entitled to any equitable relief; and further submitted that the plaintiff's remedy (if any) was at law, and that it was barred by the Statute of Limitations.

The cause came on to be heard on motion for decree before His Honor the Vice-Chancellor STUART on the 26th day of July, 1869, and His Honor, by an order of that date, decreed that the accounts should be taken against the defendants with half-yearly rests and interest at 5 per cent; and that they should pay the costs of the suit. From this order the defendants, Garrick and Monckton, appealed.

Mr. Dickenson and Mr. G. W. Collins for the appellants.—The suit is wrong in form. The husband of the plaintiff, who is suing as administratrix, ought to be a co-plaintiff; but assuming that the Court can rectify this mistake, the plaintiff can have no remedy here. The defendants, Garrick and Monckton, are not in any sense trustees. They were merely agents, so constituted by the power of attorney, to which instrument we can alone look to discover their position, and the case made against them amounts to nothing more than a breach of duty as agents, and a pecuniary claim against them which is now barred by the Statute of Limitations. *Foley v. Hill*, 1 Phill. 399, 13 L. J. Ch. 182; *Re Hindmarsh*, 1 Dr. & S. 129; *Cadbury v. Smith*, L. R. 9 Eq. 37.

[Lord Justice GIFFARD.—If I give you a sum of money, and tell you to keep it till I want it, is not that a trust?]

That is not the case before the Court: the power of attorney will not bear such a construction.

In any event, the VICE-CHANCELLOR had no power to order compound interest: it was not even prayed for in the bill, nor was any case made out for it.

Further, if we are trustees, we ought not to be ordered to pay costs: we are only taking proper steps to protect the funds in our hands.

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Mr. Greene and Mr. E. P. C. Hanson for the plaintiff.—The plaintiff's husband is before the Court, and will be bound by any order the Court may make; he need not, therefore, be a co-plaintiff.

On the merits, the authorities clearly show that the defendants were trustees for their principal, and their position is not changed by his death. *Attorney-General v. Edmunds*, 37 L. J. Ch. 706, L. R. 6 Eq. 381; *Muk peace v. Rogers*, 34 L. J. Ch. 396; *Moxon v. Bright*, L. R. 4 Ch. 292. It follows, therefore, that the Statute of Limitations does not apply. *Sheldon v. Weldman*, 1 Ch. Ca. 26; *Heath v. Henley*, 1 Ch. Ca. 21; *Teed v. Beere*, 28 L. J. Ch. 782; *Smith v. Pococke*, 2 Drew. 197, 23 L. J. Ch. 545; *James v. Holmes*, 31 L. J. Ch. 567. *Cadbury v. Smith* was a case of legatee and executor, where the legacy had never been separated from the bulk of the estate; and the decisions in *Foley v. Hill* and *In re Hindmarsh* were on the ground that the relation of trustee and *cestui que trust* did not exist.

Further, if the defendants are not trustees for the plaintiff, the statute cannot help them; for it did not begin to [\*371] \*run against the plaintiff till she took out letters of administration, which was in 1867. *Murray v. East India Company*, 5 B. & Ald. 204 (24 R. R. 325).

As to compound interest, agents are in the same position as trustees. *Earl of Hardwicke v. Vernon*, 14 Ves. 504 (9 R. R. 329); *Pearce v. Green*, 1 J. & W. 135 (20 R. R. 258). And although there is apparently no case where compound interest has been given when not prayed in the bill, the Court is not precluded by the omission in the bill from considering the question. See *Crackelt v. Bethune*, 1 J. & W. 586 (21 R. R. 241).

[The LORD CHANCELLOR referred to *Attorney-General v. Alford*, 4 De G., M. & G. 843.]

That was a totally different case from the present; and the decision of Lord CRANWORTH in it must be considered as modified by his subsequent judgment in *The Mayor, &c. of Berwick-upon-Tweed v. Murray*, 7 De G., M. & G. 497, 26 L. J. Ch. 201. And we contend that the presumption against a trustee who has committed a breach of trust by investing in his business, as these defendants have confessed by their answer they have done, is that he must pay 5 per cent with compound interest. *Walker v. Woodward*, 1 Russ. 107 (25 R. R. 9); *Jones v. Focall*, 15 Beav.

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388, 21 L. J. Ch. 725; *Williams v. Powell*, 15 Beav. 461; *Penney v. Airson*, 3 Jur. (N. S.) 62.

Mr. Napier Higgins for the defendant, Loron Burdick, submitted to any order the Court might make.

Mr. Dickenson in reply.

Lord HATHERLEY, L. C.—The first objection which has been raised on the part of the principal defendants is as to the form of the suit. The husband of the plaintiff has been made a defendant, and the other defendants say that he ought to have been made a co-plaintiff. We are both of opinion that if this objection had been taken by demurrer, it would have been successful. But the whole case being now before us, the answer put in and the evidence taken, and it being clear that the objection is one simply of form and not of substance, we shall simply direct that the bill be now amended by making the husband a co-plaintiff instead of a defendant.

That being so, we now arrive at the consideration of the merits of the case. The VICE-CHANCELLOR has directed an account against the defendants, David Garrick and John Braddick Monekton, of moneys which they have received, acting under a power of attorney from Percival Egerton Garrick. It is contended by these defendants that the time limited by the Statute of Limitations has run out since the date of their last receipt, which was given in the lifetime of Percival Egerton Garrick. The main question, therefore, which has been argued on the present occasion, is, whether the Statute of Limitations applies to a case where the persons from whom it is sought to recover the money have been acting under such a power of attorney as were these defendants. Beyond all doubt, the power of attorney in this case was in a very large and ample form, and it is manifest, on reading it, that the fullest confidence was reposed in these defendants, for the execution of everything in connection with Mr. Percival Garrick's affairs, and in his behalf during his absence. It is not contended that as such factors or agents they would not, under ordinary circumstances, be accountable in this Court; but it is contended—and the case of *In re Hindmarsh*, before Vice-Chancellor KINDERSLEY, is relied upon in support of their contention—that although it was an agency, yet the circumstances of the case are such, particularly as to the constitution of this agency, and the practice of this Court with regard to directing accounts is such, that it will not in such

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a case as the present direct an account, where the effect would be altogether to defeat the operation of the Statute of Limitations.

It is somewhat singular that in one of those cases cited by Mr. Hanson in his very able argument upon this matter, a simple appointment of an agent with confidence reposed in him seems

[\*372] \*the Statute of Limitations taking effect. It would be a

strange thing that this Court should be obliged to hold, in the case of chattels or other similar property, that if a person, for instance, has deposited plate or jewels with his bankers, because he intends to be absent from home for a great number of years, and those chattels are converted by his bankers to their own use in fraud of the owner, and the owner does come back afterwards at the end of seven or eight years, he is utterly remediless either in shape of an action at law or of a suit in this Court, because the dealing with his property has taken place in the nature of an agency. I apprehend that the true rule applicable to these cases is to be found in the case of *Foley v. Hill*, 2 H. L. C. 35, where it is clearly stated by Lord CORTENHAM, where he distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of banker, and the distinction as there pointed out is this: a mere banker takes charge of your money, not in any fiduciary position whatever with respect to keeping the particular coins or notes deposited, because it is his practice, and it is the ordinary course of trade to make use of them and so make profit. He does make use of them, and he does invest the money deposited with him, and you do not require from him, when you call upon him for repayment, those very coins or securities which you deposited with him. You part with your money to him on the assumption that in the course of trade that money may be made use of by him, and there is no trust or confidence which will affect him as to his course of dealing with it. In this case we have an agent who is intrusted with funds, not for the purpose of remitting them when received to the principal, but for the purpose of employing them in a particular manner in the purchase of land, in the purchase of stock in the funds, a certain portion being retained in hand for the purpose of answering cheques; and these moneys, in every point of view, the factor or agent is bound to keep totally distinct and separate from his own moneys, and in no way whatsoever to deal with or make use

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of for his own benefit. If that position is not exactly so analogous, as I think it is, to the position of a trustee, it is very difficult to perceive how any one can draw a distinction so nice as to say that an agent, who is expressly authorised to retain in his own hands the moneys with which his principal has intrusted him, and invest them for his principal's benefit, can be distinguished from a person in an ordinary fiduciary position, which in the eyes of this Court creates a trust and a relation which cannot be defeated by the agent setting up the Statute of Limitations against the principal. I am unable to see any distinction between an agent so placed and a trustee; and that being so, the Statute of Limitations can have no application to the case.

The case of *In re Hindmarsh* must be taken to depend upon the special facts disclosed in the report. It seems to me that the decision could not be justified if it were simply the case of a person holding funds expressly for a particular purpose, and having the duty cast upon him of holding and retaining them for the benefit of the person who so intrusted him with them; but the report shows that it was not a case of that description.

Again it is said, and this part of the argument has a material bearing on the case, that the agency was not intended to be determined, and was not determined, until the death of the principal; and that, it being clear that the agent was to be employed until the power of attorney was revoked, no debt accrued until after the death of the principal. If that be the right view of the case, the debt could still be recovered; for the law is that if the statute has not begun to run during the lifetime of an intestate, it will not begin to run until letters of administration are taken out to his estate; and here the letters of administration were not taken out until 1867. It appears to me, therefore, that the decree of the VICE-CHANCELLOR is perfectly correct in this respect.

Then comes the question of interest. The VICE-CHANCELLOR has directed interest to be charged at the rate of 5 per cent, which appears to me to be perfectly right, and for this reason, that the money was\* retained in these persons' own hands, [\* 373] and was made use of by them. That being so, the Court presumes the rate of interest made upon that money in that state of things to be the ordinary rate of interest, namely, 5 per cent.

Then comes the question whether the VICE-CHANCELLOR was correct in directing half-yearly rests, and in that respect there

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appears to have been an error introduced into the decree, because the principle laid down in the case of the *Attorney-General v. Alford* appears to be the sound principle, namely, that the Court does not proceed against any one by way of punishing him for making use of your money, by directing rests or compound interest to be paid, but proceeds upon this principle, either that he has made, or that he has put himself into such a position as that he is to be presumed to have made, 5 per cent, or compound interest, as the case may be. If you find it is stated in the bill and proved, or, possibly (and I guard myself upon this part of the case), if it is not stated but admitted on the face of the answer, without any statement on the bill, that the money received has been invested in an ordinary trade, when compound interest is always calculated as between the person making up his own accounts and a third person, rests are made. The whole course of decision has tended to this, that in most mercantile businesses, such as banking and the like, the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade—in those cases the Court directs rests to be made. In this case you have simply this, no charge made in the bill of any employment of this money which would produce compound interest. You have the admission in the answer that one of the trustees being engaged with his copartner in a solicitor's business has paid into the common account of the firm portions of this fund; but then it must not be forgotten that a solicitor's business is not a business which is at all conducted in the way I have described, or in which compound interest can be made on the moneys embarked, or that in taking their accounts half-yearly rests or yearly rests, as the case may be, can be charged. The solicitor's profit arises from the time, the labour, and the skill which he bestows upon the cases in which he is engaged. There is nothing like compound interest obtained upon the money which he is out of pocket. On the contrary, he is out of pocket for a considerable period of those moneys which he expends, and upon which he receives no interest for possibly three or four years. It appears to me, therefore, that no case arises here in which the Court could say that a profit has been made, or necessarily is to be inferred, and therefore that there was an error committed in directing compound interest, and that error must be set right.

The decree, therefore, will be varied by ordering the husband to

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be made a co-plaintiff, and by directing that no compound interest is to be charged. There will be no costs of the appeal, but I think the VICE-CHANCELLOR was correct in saying that the defendants should pay the costs.

Lord Justice GIFFARD.—The first question raised on this appeal is a question of form. A married woman sues by her next friend as administratrix, making her husband a defendant. If there had been a demurrer put in, there is not the slightest doubt but that that demurrer would have been allowed; but if allowed, leave would have been given to make the defendant a co-plaintiff. The defendants did not choose to demur but let the case come to a hearing, and no reason has been given why the husband should not be made a co-plaintiff. I am therefore of opinion that it is quite competent for the Court to direct the husband to be made a co-plaintiff, and to direct the payment to be made to the husband and wife. So much for the question of form.

Then there comes the question of the Statute of Limitations, and in this case it is quite clear that there was, during the life-time of Mr. Garrick, implicit confidence reposed in the agents on the one hand, and a duty thereupon cast upon the agents, if you call them such, on the other; there was a very special power of attorney in this case, under which they were ordered to receive and invest, to buy real property, and otherwise to deal with the property; but under no circumstances could that money be called theirs, under \* no circumstances had they the least [\* 374] right to apply it to their own use, or to keep it otherwise than as a distinct and separate account, and throughout the whole of the time that this agency lasted the money was the money of Mr. Garrick, and not in any sense theirs. Under those circumstances, admitting Mr. Garrick's right, I have no hesitation in saying that there was, in the plainest possible terms, a direct trust created between these gentlemen and Mr. Garrick. I do not think that that trust was put an end to when Mr. Garrick died, and I do not hesitate to say that where the duty of persons is to receive property and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust because there has been lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it, and I trust that in no other case similar to this will there be a contrary contention raised.

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Then as regards the question of compound interest. That clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made. If he has applied it to his own use, I think it is quite right that he ought never to be heard to say that he has made less than 5 per cent, and that that is a fair presumption to make; but if you seek to go further than that, and to charge him with more than 5 per cent, you must make out a case for that purpose. In this case there is no statement made in the bill having that object. There is an admission in the answer, that the solicitor having an account at his bankers, this money went into his account. Consequently, there being neither proof nor presumption that compound interest was made, in my opinion compound interest ought not to be charged.

#### ENGLISH NOTES.

The liability of an executor (or administrator) to pay interest on moneys representing an estate in their hands has been already discussed in the notes to *Littlehales v. Gaseyne*, No. 20 of "Administration," 2 R. C. 172. The present note is intended as a supplement to the authorities there mentioned.

The example set by FRY, J., of fixing 3 per cent as the ordinary Court rate instead of 4 per cent (see *Gilroy v. Stevens*, cited 2 R. C., at p. 174), has been followed by NORTH, J., and KEKEWICH, J., in *In re Dracup, Field v. Dracup* (1893), 1894, 1 Ch. 59, 63 L. J. Ch. 238, 69 L. T. 858, 42 W. R. 264; and *In re Goodenough, Marland v. Williams* (1895), 2 Ch. 527, 65 L. J. Ch. 71, 73 L. T. 153, 44 W. R. 44; and has apparently the approval of STIRLING, J., see *Re Lambert, Middleton v. Moore* (1897), 2 Ch. 169, 66 L. J. Ch. 624.

The Court of Chancery also established an ordinary and a penal rate in cases where there was not the express relation of trustee and beneficiary, but merely a fiduciary relation, as would be the case between principal and agent. As examples may be mentioned *Tyrrell v. Bank of London* (H. L. 1864), 2 R. C. 497, 10 H. L. Cas. 26, 31 L. J. Ch. 369, and *Liquidators of Imperial, &c. Association v. Coleman* (H. L. 1873), L. R. 6 H. L. 189, 42 L. J. Ch. 644, 21 W. R. 696. Concealment of a bargain affecting the position of a director towards a company was held sufficient to require the infliction of the penal rate of interest in *Archer's Case* (C. A. 1891), 1892, 1 Ch. 322, 61 L. J. Ch. 129, 65 L. T. 800, 40 W. R. 212.

Owing to the changes of procedure introduced recently, Courts have allowed interest in actions which, although apparently common-law

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actions, are really in respect of equitable claims. See *Harsant v. Blaine* (C. A. 1887), 56 L. J. Q. B. 511, referred to at length in the last notes (p. 560, *ante*).

## AMERICAN NOTES.

When a trustee mingles trust funds with his own, as by depositing them to his individual credit, he is chargeable with interest. *Hess' Estate*, 68 Penn. State, 458; *Aldridge v. McClelland*, 36 New Jersey Equity, 288; *Estate of Perkins v. Hollister*, 59 Vermont, 348. So if he uses them to his own advantage. *Merrifield v. Longmire*, 66 California, 180; *Whitney v. Peddicord*, 63 Illinois, 249; *Duffy v. Duncan*, 35 New York, 187; *Bruner's Appeal*, 57 Penn. State, 46.

But in *Schofield's Estate*, 99 Illinois, 513, it was held that interest would not be charged against an administrator for merely mingling the funds of his estate with his own, so long as he held the trust fund at his command ready to comply with the orders of the Court.

The claimant may elect to take simple interest or the profits of trade in which the trustee has employed the money. *Robinnell's Appeal*, 36 Penn. State, 174; *Kyle v. Barnett*, 17 Alabama, 306; *Barney v. Saunders*, 16 Howard (U. S. Sup. Ct.), 543; *McKnights' Ex'r's v. Walsh*, 23 New Jersey Equity, 133; 24 ibid. 498.

The authorities are very well collated in *Perkins v. Hollister*, *supra*, as follows: "The general rule adopted by Courts in respect to interest chargeable on trust funds is to charge the executor or trustee with such interest or profits as he has received or made, or with due diligence might have made, from the money in his hands lawfully invested. And the rule is also well settled that an executor or trustee who uses the trust money in business, trade, or speculation is chargeable with interest on it; so if he mingles it with his own and uses it in common; so if he suffers it to lie idle when he might have invested it. This rule is founded in justice and good policy; it prevents abuse and indemnifies against negligence. Courts and decisions differ as to what rate of interest shall be charged in such cases; and it may be said that every case depends on its own circumstances."

"WILLIAMS, Ch. J., in *Phelps v. Slade*, 10 Vt. 192, in speaking for the Court upon the subject of interest, says: 'It is difficult to lay down any general rule on the subject of interest applicable to every case arising upon an administrator's account. The circumstances of each particular case may vary the rule, and lay the foundation for the application of a new principle. Executors and administrators are trustees, and must be faithful in the execution of their trust, and so conduct as not to subject the estate to any unnecessary expense or charge.'

"But it may be regarded as a well-settled principle that when an executor or other trustee has invested the trust fund in his business or trade, or in speculation, or continued it in them, he may be called upon to account for the profits or for interest at the highest legal rate as a penalty for his breach of duty. 2 Story Eq. Jur., s. 1277; Hill on Trustees, pp. 372, 375; Perry on Trusts, s. 471; *Barney v. Saunders*, 16 How. 535.

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"But this rule is applied only in cases of gross misconduct, such as employing the funds in business, trade, or speculation, or where the trustee has refused to disclose the profits or interest realized on the trust money. In most of the cases, if not all, where the trustee has been charged with the highest rate of interest or profits for using the trust fund in his own business, the trust fund was embarked by him in his business, or used in trade or speculation. The same principle is applied where the trustee has neglected or refused to disclose the interest or profits realized on the trust fund.

"Justice GRIER, in *Barney v. Saunders*, 16 How. 535, clearly and tersely states the rule as follows: 'On the subject of compounding interest on trustees, there is, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and wilfully neglected, where the funds have been used by the trustees in their own business, or profits made, of which they give no account, interest is compounded as a punishment, or as a measure of damages for undisclosed profits, and in place of them. For mere neglect to invest, simple interest only is given.'

"In *Schieffelin v. Stewart*, 1 Johns. Ch. 620, where the administrator had used the money of the estate in his business, and had made large loans for his own benefit, and had not disclosed the profits of the money so invested, Chancellor KENT said: 'The only question in the case is whether the charge of compound interest be proper. It was the duty of the administrator to have made distribution of the assets or placed them in a situation to become productive, and to accumulate for the heirs. He did neither, but employed the money in his own business or trade, or in making large loans for his own benefit; and as he has not disclosed, as he might have done, to the Master, what were the profits of the assets so employed, it appears to me, as well on principle as on authority, that he is justly chargeable with the interest (compound) contained in the report. The only way for the plaintiff to avoid this conclusion was by fairly disclosing what he had made by the use of the money. It is certain that the allowance of compound interest is often essential to carry into complete effect the principle of the Court, that no profit, gain, or advantage shall be derived to the trustee from his use of the trust funds. It secures fidelity and removes temptation, and it is the ground of the allowance of annual rests in taking the account where the executor has used the property and does not disclose the proceeds.' The same principle is laid down by Chief Justice TILGHMAN in *Fox v. Wilcocks*, 1 Binney, 191; also in *Findlay v. Smith*, 7 Serg. & Rawle, 264. In *McCloskey v. Gleason*, 56 Vt. 264, Judge Ross, in delivering the opinion of the Court, says: 'Instead of relaxing the rule charging the trustee—who so intermingles the trust estate with his own that he cannot tell what property belongs to the estate, nor what gains he is making thereon—with the highest legal rate of interest, and allowing him nothing for his services, it should be made more stringent.'

In *Ames v. Scudder*, 11 Missouri Appeals, 168, it was held that compound interest would not be charged against negligent trustees, where there was no "realization of profits on the assets, or any withdrawal of funds from their legitimate channels of accumulation," nor facts raising "any presumption that the assets would have been increased in any way if the line of duty had been more strictly followed."

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No. 1. — Cholmondeley v. Clinton. — Rule.

Where a testator and his executor had been partners, and the latter, without separating the interest of the former in the firm property and assets, continued to employ it in the business, he was charged with compound interest. *Hannahs v. Hannahs*, 68 New York, 611: “While compounding interest is in some sense a penalty for negligence or wrong-doing, the executor here was properly chargeable with negligence.”

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## INTERPRETATION.

SECTION I. General Principles of Interpretation of Written Instruments.

SECTION II. Interpretation of Deeds and other instruments *inter partes*.

SECTION III. Interpretation of Acts of Parliament.

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SECTION I. — *General Principles*.

No. 1. — CHOLMONDELEY v. CLINTON.

(CH. 1817, 1820.)

No. 2. — GREY v. PEARSON.

(H. L. 1857.)

## RULE.

IN the interpretation of written instruments, the rule is to gather from the whole instrument the intention of the person or persons whose mind is presumed to be expressed by the instrument. The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.

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No. 1.—*Cholmondeley v. Clinton*, 2 Mer. 171—176.

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**Cholmondeley v. Clinton.**

2 Merivale, 171—362; 2 Jacob & Walker, 1—201 (22 R. R. 83, 84 *et seq.*).

*Interpretation.*—*Principles of.*—*Destination in Plain Words.*—*Context.*

G. being tenant in fee of an estate derived from his maternal grandfather, S. R., by a deed, in 1781, reciting that he was desirous that the estates should remain in the family and blood of S. R., and to the intent that the estates might continue in the family and blood of his late mother on the side of her father, settles the estates to the use of himself for life, remainder to the heirs of his body; for default of such issue as he should appoint: for default of appointment, “to the use of the right heirs of S. R.” G. was at the time of the settlement himself the right heir of S. R. *Held:* by Sir W. GRANT, M. R., and a majority of the King’s Bench, that the ultimate limitation was, in effect, a limitation to G. himself and his heirs; by BAYLEY, J., dissenting from the judgment of K. B., and by Sir T. PLUMER, M. R., that the intention of the limitation was to bring in the person of the mother’s family who would be heir, on the heirs *ex parte paternā* being excluded.

The suit of *Cholmondeley v. Clinton* was a suit in which various points were keenly contested. It was ultimately decided by the House of Lords on a ground which is now beyond controversy by statute (3 & 4 Will. IV., c. 46); namely, that a suit to establish a right to possession under an equitable title is barred by the same limitation which would be a bar to recovery under a legal title.

The case will here be only reported upon the point which was elaborately argued before Sir W. GRANT, M. R., and afterwards before Sir T. PLUMER, M. R., as to the construction of the ultimate limitation in a certain deed of 1781. This was a settlement in the form of a lease and release, made by George, Lord Orford, of an estate which had come to him, through his mother, from his maternal grandfather, S. R.

This indenture of lease and release was dated the 1st and 2nd of August, 1781, and expressed to be made between the said [176] George, Earl of Orford (described as only son and heir of Robert, Earl of Orford, by Margaret, his wife, who was daughter and only surviving child and heir of Samuel Rolle, who was only son and heir of Robert Rolle, Esquire, by Arabella, his wife, who was daughter and co-heir of Theophilus Clinton, Earl of Lincoln and Baron Clinton), of the one part, and Joshua Sharpe of the other part. It recited the will of Samuel Rolle, and his death, leaving his daughter Margaret him surviving, her marriage with Robert, Earl of Orford, and her death, leaving him, the said

No. 1.—*Cholmondeley v. Clinton*, 2 Mer. 176, 177.

George, Earl of Orford, her only son, who thereby became tenant in tail of the premises; and recited an indenture of bargain and sale and recovery (by which the premises became vested in himself in fee), and that he was "willing and desirous that the said premises should continue and remain in the family and blood of the said Samuel Rolle." It was then witnessed, that "for and in consideration of the natural love and affection which

\* the said George, Earl of Orford, had and bore unto his [\*177] relations, the heirs of the said Samuel Rolle, and to the intent that the manors, &c., and hereditaments thereafter mentioned might remain, continue, and be in the family and blood of his late mother, the said Margaret, Countess of Orford, on the side or part of her father, the said Samuel Rolle," and for other considerations, he, the said George, Earl of Orford, conveyed, &c., all and singular the manors and hereditaments therein mentioned (being the estates devised by the will of Samuel Rolle), to the said Joshua Sharpe, his heirs and assigns, to the use of him, the said George, Earl of Orford, for life; and after his decease to the use of the heirs of the body of him, the said George, Earl of Orford; and for default of such issue, to the use of such person, &c., for such estate, &c., as the said George, Earl of Orford, by deed or will, should appoint; and in default of appointment, "to the use of the right heirs of the said Samuel Rolle for ever." And in the said deed was contained a general power to the said George, Earl of Orford, of revoking the uses therein before specified, and of limiting and declaring new uses of the same premises, or any part thereof.

The said George, Lord Orford, subsequently mortgaged the estate to pay off certain incumbrances. He died on the 5th of February, 1791, without issue and intestate as to the equity of redemption. At the time of his death (or rather at the instant before his death, when the default of exercise of the power of appointment became determined), the person who would be accurately described as the right heir of Samuel Rolle was George, Lord Orford, himself. But in the arrangements made upon his death, it was assumed by all parties that the intention of the settlement was that the estate should go to the person representing Samuel Rolle by way of descent from his mother, Arabella, and this construction was acted on, and the estate possessed, accordingly, for more than twenty years.

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No. 1.—*Cholmondeley v. Clinton, 2 Mer. 177–341.*

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The judgment of Sir W. GRANT, M. R., was, so far as relates to the question of construction of the settlement of 1781, as follows:—

[340] The MASTER OF THE ROLLS.

The substantial question in this cause is, which of the parties is entitled to an estate which, being derived from a gentleman of the name of Samuel Rolle, is denominated the Rolle Estate? Lord Clinton and his father had, for more than twenty years before the filing of the present bill, been in the undisturbed possession of this estate, and had been considered as the undoubted owners of it. The plaintiffs now say, that it was under a mistake with regard to the effect of a deed executed in 1781 that this long enjoyment had been permitted; that, when the late Lord Clinton took possession of the estate, it really belonged to the late Horace Walpole, Earl of Orford, and from him has either descended to the plaintiff, Lord Cholmondeley, as his heir-at-law, or passed to the other plaintiff, Mrs. Damer, as his general devisee. The estate is subject to a mortgage made prior to the time when the right of either of these parties accrued; and it is from this circumstance that the question of title comes to be discussed in a Court of equity. The plaintiffs, assuming that the equity of redemption is in them, or one of them, filed this bill, for the purpose, first, of redeeming the mortgage, and secondly, of obtaining from Lord Clinton, [\*341] the possession of the estate, and an account \* (for a certain period, at least) of the rents and profits which he has received.

The mortgage has, in point of fact, become vested in a trustee for Lord Clinton; but that does not in any degree affect the substance of the question between the parties. The last undisputed owner of this estate was George, Earl of Orford, who died in the year 1791. He had succeeded to it on his mother's death, as tenant in tail under the will of his maternal grandfather, Samuel Rolle; and having suffered a common recovery, became seised of the fee, subject to a mortgage for a term of years, which he afterwards converted into a mortgage in fee. Being the absolute owner of this estate, he (in 1781) executed a settlement of it, on the effect of which the first question in the cause depends.

After a recital, to which I shall afterwards more particularly advert, he limited the estate to the use of himself for life; remainder to the heirs of his body; remainder, in default of such

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heirs, to such persons as he should appoint; with a remainder to the right heirs of Samuel Rolle; and then he reserved a general power of revocation and new appointment. Under the limitation to the right heirs of Samuel Rolle, Lord Clinton claims to be entitled, as he was right heir of Samuel Rolle at the time of the death of Earl George, who had no issue, and never revoked the uses of the settlement, nor executed any new appointment under the power.

If his claims under this deed cannot be sustained, the consequence would be that the estate descended to Horace Walpole, Earl of Orford; but, even then, it is contended by Lord Clinton that he is entitled to the estate, because (in the year 1794) Horace, Earl of \*Orford, executed a deed, which supplied [\* 342] any defects that there might have been in his (Lord Clinton's) title, and conveyed all the interest which Earl Horace had in the estate. The effect of this deed of 1794 forms the second question in the cause.

The last question, as between the plaintiffs and Lord Clinton, is, whether, supposing neither of the deeds gave the latter any title to the estate, the long possession which has been had of it by himself and his father does not operate as a bar to the plaintiff's claim.

1. I have already said, the first question turns on the limitation in the deed of 1781 to the right heirs of Samuel Rolle. It happened that George, Earl of Orford, was himself the right heir of Samuel Rolle. The strict effect of the limitation was, therefore, to leave the reversion where, without any such limitation, it would have remained, namely, in Lord Orford, the grantor in this deed; and, on his death without issue, the fee would descend to his heir-at-law, who was Horace, Earl of Orford. But Lord Clinton contends that it is not in its strict literal sense that this limitation ought to be understood; that Lord Orford's intention appears to have been so to settle the estate as to carry it to his relations on the mother's side, in default of issue of his own body; and that, to effectuate such intention, we must understand the words as designating not the heirs of Samuel Rolle at the time of the execution of the deed, but such persons as should be his heirs at the time when there should be a failure of Lord Orford's own issue. That Lord Orford had the intention which is ascribed to him, there can, I think, be no reasonable doubt. The deed begins

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by stating his pedigree *ex parte maternâ*. He carries it up to Theophilus, Earl of Lincoln, Baron Clinton, from whom the late

Lord Clinton was also, in the female line, descended.

[\* 343] \*The professed consideration on which the deed was made was "the natural love and affection which he had and bore unto his relations, the heirs of Samuel Rolle;" and the intent of the settlement was "that the manors, messuages, lands, tenements, and hereditaments thereafter mentioned might remain, continue, and be in the family and blood of his late mother, Margaret, Countess of Orford, on the side or part of her father, the said Samuel Rolle." It is clear that, if the limitation operates in the manner contended for by the plaintiffs, this intention will be wholly defeated; for it will carry the estate to the paternal uncle, who had in him none of the blood of Margaret, Countess of Orford, Earl George's mother. But the question is, whether the Court can mould the words of the deed so as to carry this intention into execution.

It is true that Courts ought to expound deeds as well as wills according to the intention of the maker. But it has never been said that a Court is so to frame or alter a deed as may best effectuate the maker's intention. The party is left to execute his own purpose in his own way. He may execute it unskilfully and insufficiently; but, if the dispositions which he makes are clear and unambiguous, the Court cannot alter them merely because they are ineffectual to the attainment of the proposed end. As the words of this limitation stand, they are descriptive of the person (whoever he might be) that was, at the time of the execution of the deed, the heir of Samuel Rolle. Supposing we were to read this limitation without knowing who the person was that answered the description, no doubt could possibly be raised upon its construction. All would agree that the then existing right heir would

take a vested remainder; and it would be impossible to con-[\* 344] tend that this was a contingent remainder to such \* persons as should, at some future period, answer the description.

When it is found that Lord Orford is himself the present right heir, do the words, therefore, change their meaning? No—but they are unskilfully employed; and, with the meaning that properly belongs to them, they will not effectuate the purpose which the framer of the instrument had in his contemplation. The sense of the limitation is unambiguous—the legal effect of it is clear;

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but it is a limitation which will not carry the estate into the channel in which the grantor wished it to pass. If you can show then that the words are in themselves of doubtful signification, or that there is no person to whom, in their strict technical sense, they can apply, you lay a ground for inquiring whether they may not be understood in a sense different from that which they properly bear. When, for instance, there is a limitation to the heirs of a living person, there is no one who answers the description: the question, therefore, arises, whether the words were not used as a designation of the heir apparent. So where there is a limitation to an heir male, as a purchaser, and the very heir is a female, there is no person to whom the whole description in strictness applies. It is a question, therefore, who shall take under that ambiguous description. But where the word "heirs" is used without any qualification, and there is a person who completely answers the description, it would be a strong thing to say that that is not the person to whom the description shall be applied. When you introduce the fact that the person whose heirs are spoken of is alive, you raise an uncertainty as to the application of the description; but the fact that Lord Orford was the right heir of Samuel Rolle creates no uncertainty as to the meaning or the application of the words "right heirs." The words do not become words \* of futurity because it happens that [\* 345] they apply to A. and not to B., nor words of uncertainty because it is to A. and not to B. that they do apply.

But the argument is, that, if you give to them their proper meaning and their proper application, the purpose of the grantor will not be attained, and therefore you ought to conclude that he must have used them in some other than their proper sense; and that the sense in which the Court must understand them, or, rather, to which it must alter them, is that by which the purpose of the grantor would most effectually have been accomplished.

Supposing the grantor had been apprised of the effect of such a limitation as he has actually made, there is little doubt that he would have framed it differently. But we cannot know, with the least certainty, how he would have framed it. In order even to conjecture what the alteration would have been, we must know wherein the mistake made by the framer of this deed consisted. Did he suppose that a remainder vests in the persons who answer the description at the time when the preceding limitations expire?

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Or did he overlook the circumstance that Lord Orford was himself the right heir of Samuel Rolle? Or did he conceive that the grantor could not himself be considered as the object of his own grant, and that the words would, therefore, designate such persons as would, if Lord Orford were out of the question, answer the description of right heirs of Samuel Rolle? According to the nature of the misconception, under which the words actually used have been introduced into the deed, would be the nature of the alteration, which (upon the correction of that misconception) would have been made. The Court is desired to say that there is in this deed

(when properly construed) a limitation to such persons as [\* 346] should be the \*right heirs of Samuel Rolle at the time when the preceding limitations should expire. The deed itself does not furnish the least evidence of an intention so to frame the limitation; nor have we any ground for supposing that this is what the drawer of the deed conceived himself to have accomplished, when he used the words he has employed. It is only because this would have been the most proper limitation to effect the grantor's object, that we are desired to say it is the limitation which he has actually made.

If I were to indulge conjecture, I should say that there was no intention to frame the limitation in the manner now proposed; and that the blunder which (unfortunately for Lord Clinton) has been committed was, in all probability, of quite a different sort. Through whatever strange misapprehension it may have happened, I rather think the words "right heirs of Samuel Rolle" were used as descriptive of actually existing persons other than Lord Orford himself. For see what is said in the recital. He says, "In consideration of the natural love and affection which the said George, Earl of Orford, hath and beareth unto his relations, the heirs of Samuel Rolle." Here he speaks of existing relations, whom he describes as being then the heirs of Samuel Rolle. How he came to think that that appellation could apply to them, while he himself was living, it is impossible to guess. But surely it is much more probable that he used the words "heirs of Samuel Rolle" in one part of the deed in the same sense in which it is manifest he used them in another, than that, after having spoken of "the love and affection" which he bore to existing persons, under that denomination, as one of his inducements for making the deed, he should afterwards intend, by the very same denomination, to limit

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his estate to some future unascertained persons, who might be altogether \* unknown to him. I think there would be [\*347] more ground for contending that this ought to be turned into an immediate limitation to the late Lord Clinton as the *persona designata*, though under an improper description, than into a prospective limitation to such persons as should, at a future period, answer that description. Yet it is in the latter way that the defendants' counsel contend the alteration ought to be made. Is not the very uncertainty how it should be made the strongest reason for not at all attempting to alter words that have a plain meaning, merely because we could now substitute words that would have been much better adapted to the attainment of the object of the grantor? There is nothing executory in this deed — nothing which gives the Court a power to modify the means by which the grantor himself proposed to arrive at his end. The deed, too, is purely voluntary. There is no contract which can entitle any person to say that, if the words of the deed go beyond, or fall short of the intended purpose, it ought to be so construed or so reformed as to place the parties in the situation in which, by their bargain, they were intended to stand.

In the case of *Seymour v. Boreman*, Cha. Rep. 123, where a son of the second marriage claimed to take under the appellation of heir male of the body of the father and mother, while there was a son of the first marriage living, though the intention was perfectly clear, yet the Lord Keeper said the limitation was defective at law, and the plaintiff could have no remedy there; but that, according to the true meaning of the marriage agreement, he was well described to take the rent. It was therefore by virtue of the contract that the Court was there enabled to put upon the word "heirs" a sense which, legally and strictly, it did not bear. But I have no contract \* here which enables me to deal [\*348] with the words according to the reciprocal intention of the parties.

I have looked into all the authorities that were referred to during the very able discussion which this subject underwent at the Bar, without discovering one which would serve as a precedent for the construction, or rather the alteration I am desired to make, even if this were the case of a will and not the case of a deed. And therefore I have not thought it material to advert to the question, whether deeds to uses are to be construed with the same

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laxity as wills, or with the same strictness as common-law conveyances.

I shall particularly mention only one case, for the purpose of showing with what difficulty technical words are, even in a will, diverted from their appropriate meaning, although the intention of the testator seems obviously to require that they should not be applied to the person who properly answers the description. The case I mean is that of *Doe* on the demise of *Bailey v. Pugh*, Butl. Fearne's Cont. Rem. App., 3 Bro. P. C. Toml. ed. The testator said, "As to my real estates, after the decease of my wife, I give and devise to the eldest son of my son begotten or to be begotten all my estates in London and Middlesex, for his life; to the second son all my estates in the county of Hertford for his life, subject to pay all the charges of a man I have appointed to look after them, keep them in good repair, &c., and so on in the same manner to all the sons my son may have—if but one son, then all the real estate to him for his life; and, for want of heirs of him, to the right heirs of me, the testator, for ever, my son excepted; it being my will he shall have no part of my estates, either real or personal."

The testator left this son and three daughters, — the son died without issue, and then the

[\* 349] question arose, who was to take \* under this devise "to his own right heirs, his son excepted." The daughters contended that they must be the *personæ designatæ*, for that the son, who was the proper heir, was plainly and manifestly excluded, not only by the intention, but by the express words; and the Court of K. B. were of that opinion, for they held that the words were to be interpreted as if the testator had said, "those who would be my right heirs if my son were dead." The case, however, went to the House of Lords upon a writ of error; and, when it came before Lord THURLOW, he proposed a question for the opinion of the Judges in the following terms: "Whether any person, and who, took any and what estate under the will mentioned in the special verdict by way of devise and purchase;" and the LORD CHIEF BARON having delivered the unanimous opinion of the Judges present, that no person took any estate under the will mentioned in the special verdict by way of devise and purchase, it was thereupon ordered and adjudged that the judgment given in the Court of K. B. should be reversed. Now, that the testator, in that case, could not mean his son to take under the denomina-

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tion of right heir, is at least as manifest as that Lord Orford did not mean to limit the estate to himself under the appellation of the right heir of Samuel Rolle. The alteration suggested, as expressive of the testator's intent, in that case, was not at all stronger than that which is here proposed. It was as easy to say that the testator meant such person as would be right heir if his son were dead, as to say that, by the limitation in this case, is meant such person as would have been right heir if Lord Orford had been dead, or such person as should be right heir at his death, or such person as should be right heir on the failure of his issue. And, if we were at liberty to alter technical words, there was less room for uncertainty in that case than there is in

\*this, how the alteration should be made. There was, [\*350] in that case, an opening, and, apparently, even a call, for some construction to give a meaning to words which, literally taken, seemed to be repugnant and inconsistent; for, having reference to the fact that the excluded son was the heir, the limitation, according to the letter, was to his right heirs, his right heir excepted. Whereas, in our case there is nothing repugnant, nothing insensible, in the words as they stand; and the argument is only that the grantor could not have meant to say that which he has plainly said. I should not, therefore, have thought the decision of the Court of K. B. would have been an authority for the alteration I am desired to make, while that of the House of Lords is a strong authority the other way. For it imports that, if there be a person who properly answers the description of right heir, those words cannot be a *designation* of any other person, although the intent, not to apply them to the real heir, be perfectly manifest.

Upon the whole of this part of the case, I am of opinion that Lord Clinton took no estate under the deed of 1781. . . .

After the original hearing of this [2 Jacob & Walker, 1-206] cause, reported in 2 Mer. p. 171 (and *supra*), a case was sent for the opinion of the Judges of the Court of King's Bench, in which \* the question was, whether [\*2] Robert George William Trefusis, afterwards Lord Clinton, the father of the defendant, Lord Clinton, took any estate under the deed of the 2nd day of August, 1781.

The case was twice argued in the Court of King's Bench: first

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by Mr. Richardson for the plaintiffs, and Mr. Preston for the defendants; and afterwards by Mr. Shadwell for the plaintiffs, and Mr. Serjeant Copley for the defendants. The arguments are reported in 2 Barn. & Ald. 625.

The following certificates were sent by the Judges:—

" This case has been argued before us by counsel; and considering that the words 'the right heirs of Samuel Rolle' are words of plain and well-known import, and according to that import must denote George, Earl of Orford, the settlor, we think that Robert George William Trefusis, afterwards Lord Clinton, took no estate under the said indenture of the 2nd of August, 1781. Supposing a different construction might be put upon those words in a deed, and that they might be held to designate some other persons, in order to carry into effect a manifest intention on the part of the settlor, yet we do not collect with certainty from the language of the deed what \* other person the settlor intended to designate by those words.

" C. ABBOTT,  
" G. S. HOLROYD,  
" M. D. BEST."

" This case has been twice argued; and considering that it appears by the indenture of the 2nd of August, 1781, that the said George, Earl of Orford, knew himself to be the then heir of Samuel Rolle; considering, also, that during the life of the said George, Earl of Orford, or so long as there should be any issue of his body, no person could legally come within the description of right heir of Samuel Rolle, but the said George, Earl of Orford, and his issue, who were of the united line of Walpole and Rolle, and were also provided for by the estate tail, created by the indenture; considering, also, that it appears plainly, by that indenture, that the said George, Earl of Orford, meant to provide for the separate line of Rolle, that no person of that separate line could come within the description of right heir of Samuel Rolle till the united line should be exhausted, and that a limitation, by way of remainder to heirs or children, is not necessarily confined to such persons as are within that description at the time the limitation is created,— I am of opinion that the effect of the indenture of the 2nd August, 1781, was to vest in the said George, Earl of Orford, an estate in tail general, with remainder (if he should make no appointment) to such person as, at the expiration of the estate tail, should be

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the right heir of Samuel Rolle in fee; and, consequently, that the said Robert George William Trefusis took an estate in fee under the said indenture.

J. BAYLEY."

Subsequently the cause came on for hearing before Sir T. PLUMER, M. R., who, having taken the case into consideration, after an elaborate argument, pronounced the following judgment:—

The MASTER OF THE ROLLS.<sup>1</sup>

[65]

This case comes before the Court on further directions, upon an order pronounced on the 27th June, 1817, by which a question was sent, as one fit for the determination of a Court of law, to the Judges of the Courts of King's Bench for their opinion, whether Robert George William Trefusis, afterwards Lord Clinton, father of the defendant, Lord Clinton, took any and what estate under the indenture of the 2nd August, 1781: Upon that question the Judges have returned the certificates of their divided opinions. The Court, being in possession of them, has now to consider what further directions ought to be given. That same question must, if there had been no change in the Court, have come under the consideration of the great and learned Judge who made the order; \* and he would now have had to pronounce, for the [\* 66] first time, a decree in the cause, nothing having been hitherto done by the Court except pronouncing the preceding order, and except delivering a clear and explicit opinion upon all the questions in the cause.

The first question, therefore, now to be considered seems to be that which separately relates to this question of law. Upon that the only point contended for by the counsel on the part of the defendants, or which could indeed be contended for by them, after the weight of authorities against their client, is, that before a question of this nature and magnitude is finally decided, another opportunity ought to be afforded for the reconsideration of it in a Court of law; a proceeding certainly not without precedent, but not to be directed as a matter of course, nor unless the ends of justice shall appear to demand it.

It is impossible that I should not be impressed with a sense of

<sup>1</sup> The editors (Messrs. Jacob & Walker) mention that they have been favoured by his Honour the MASTER OF THE ROLLS with a note of his judgment, corrected by himself.

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the heavy responsibility now cast upon me, the great respect and deference due to the opinions of those who have preceded me in judgment in this great cause, and the comparative inferiority that must belong to any opinion of mine. But I cannot feel that I should have properly discharged the duties of my station, or have acted up to the expectation which the parties engaged in this long and important cause have, I think, a right to entertain, if I had forborne to form an opinion of my own on all the subjects brought before me, or if, having formed that opinion, with all the care and industry that my other duties have permitted, I should now omit to state it, and the grounds on which it has been formed.

I have been referred by the counsel for the plaintiffs, both in the opening of these proceedings and in the reply to the [\* 67] opinion which was delivered by the late \*MASTER OF THE ROLLS, as containing the pith and substance of all that had been or could be urged in support of their case; and I shall therefore follow and refer to that opinion throughout in the views which are therein taken of it, stating, as I go along, the points in which I have the satisfaction to concur, and those in which I have the serious task of differing with so great an authority. In entering upon that examination, it will not, I hope, be deemed an improper momentary digression, if I avail myself of this opportunity of paying a tribute to that most able and deservedly estimated Judge, not by giving vent to my own feelings of personal friendship and respect, which might not be deemed suited to this place, but by the expression of that general feeling of admiration, which I am sure must be common to all, either in or out of the profession, who have heard or read this and the other opinions, which have so eminently characterised the whole of his judicial career: admiration not only of the depth of thought and learning, but likewise of the profundity and strength, the closeness and the accuracy of reasoning, the masterly perspicuity and conciseness, and the peculiar felicity of style by which they are distinguished, which will render them long a standard of judicial eloquence, such as all should imitate, few can equal, and none can excel.

The substance of the opinion of that learned Judge, which is in print, and in the possession of everybody, I think may be reduced to three propositions: 1st, That though he thought there was no doubt as to the purpose with which Lord Orford made the settlement, and the description of person to whom he meant to give the

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estate, in the event of a default of issue of his own body, yet that the words of the limitation could not be so moulded as to carry that intention into execution, that the Court was bound to give them their first and appropriate \* meaning, which [\* 68] he thought did not admit of any other construction than that of giving a vested remainder to the person who was the right heir of Samuel Rolle at the time of the execution of the deed. 2ndly, That the deed did not furnish any the least evidence of an intention to frame the limitation in the manner contended for by the defendants, namely, to such persons as should be right heirs of Samuel Rolle at the time when the preceding limitation should expire; that we have no ground for supposing that this is what the drawer of the deed supposed himself to have accomplished, when he used the words he has employed; and that it is only because this would have been the most proper limitation to effect the grantor's object, that we are desired to say it is the limitation which he has actually made. 3rdly, That as to the actual intent of the framer of the deed, the conjecture which the MASTER OF THE ROLLS rather seemed inclined to adopt was, that the words "right heirs of Samuel Rolle" were used as descriptive of actually existing persons other than Lord Orford himself, and that there would be more ground for contending that this ought to be turned into an immediate limitation to the late Lord Clinton, as the person designated, though under an improper description, than into a prospective limitation to the persons who, at a future period, should answer that description. This opinion, however, ended in a reference of the question to the opinion of the Judges of a Court of law, which they have returned by their certificates.

The certificates are as follows: (His Honour here read them at length.) The reasons for the opinions contained in these certificates, beyond what they import, we are not in possession of; but it is evident, on the face of them, that these high authorities differ in opinion not merely as to the effect of the limitation in question, but likewise upon both the points on which \* the [\* 69] construction of it depends. The first, a general question as to the rule, by which the construction of such a limitation is to be governed, whether intention, when sufficiently manifested, can in any case control the legal import. The second, a question applying solely to this particular case, as to the sufficiency of the evidence it affords of the intention of Lord Orford. Upon the first

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point the three learned Judges appear by their certificate to concur with the MASTER OF THE ROLLS in thinking that the true criterion by which this case is to be governed is not the actual meaning and intent of the framer of the deed, but the legal import and effect of the terms he has made use of. They conceive the rule of construction applying to them to be peremptory and inflexible in favour of the legal import in all cases, and under all circumstances, without regard to a different meaning in the framer of the deed, even though such meaning should be sufficiently manifested by the circumstances of the gift, and the other parts of the deed: that the terms in which the limitation is expressed have annexed to them an unambiguous, settled, well-known, and appropriate meaning, which cannot be varied in any case by any circumstances extrinsic to it; according to which the Court is bound to consider them as conferring a vested remainder on the person who, at the time of the execution of the deed, was the right heir of Samuel Royle: that such meaning must be inviolably and universally adhered to in preference to and in exclusion of any manifestation of a contrary intent, however clearly the same may be established by collateral circumstances, if they could be resorted to, in aid of the construction, or even though such circumstances appear on the face of the deed.

This rule, if it were satisfactorily established to be of [\* 70] this inflexible and universal extent, would supersede \* and render unnecessary any inquiry into the facts of the present case, tending to show the particular meaning and intent which Lord Orford had in the use of the words "right heirs in this limitation." But the same authorities have declared, under the second head, that if the rule were not of this binding nature, and if the construction were to depend on a manifestation of intent as to the person intended to take when sufficient to overcome the legal import, yet that such manifestation of intent is not sufficiently made out in the present case.

Mr. Justice BAYLEY differs on both these points. As to the general question, he does not deny the existence of a general rule of construction applicable to limitations of this nature, but he denies it to be of that universal and inflexible nature by which, in all cases and under all circumstances, the construction is to be governed. A limitation, he states, by way of remainder to the heirs or children of a deceased person, is not necessarily confined

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to such persons as are within that description at the time that limitation was created. Collateral circumstances, apparent on the face of the deed, may, he thinks, and ought to be resorted to, when they exist, in aid of the construction, for the purpose of discovering the real meaning of the settlor as to the person intended to be designated by the terms made use of as his grantee; and that this first meaning, if clearly and sufficiently manifested, may be allowed to get the better of the legal import, and to prevail in favour of the person so proved to have been really intended to be designated. As to the application of this principle of construction to the present case, he thinks, under the second head, that the circumstances attending the present grant, as they appear on the deed, are sufficient to make out such a clear manifestation of Lord Orford's intent to designate by the term "right heir," there used, not according to the legal \* import, the [\*71] then present right heir of Samuel Rolle, but the person who would be the right heir of Samuel Rolle at the expiration of the prior estate tail, as ought in this case to prevail in his favour, over the ordinary operation of legal import in favour of the present heir.

In this state of conflicting authority it becomes necessary to consider the subject under both the heads before mentioned, into which the argument seems naturally divided: the first as to the nature and extent of the rule in favour of the legal import applied to a limitation of this nature; the second as to the effect of the proofs afforded in this case of the meaning annexed by Lord Orford to the terms made use of by him in this limitation.

The deed, on which the question arises, was a settlement made on the 2nd of August, 1781, of an estate in the counties of Devon and Cornwall (called, from the former possessors, the Rolle estate), by George, Earl of Orford, the then absolute owner in fee. The Earl had succeeded on the death of his mother in the January preceding, under the will of his grandfather, Samuel Rolle, to this estate, together with another in the county of Dorset, but which latter was not included in this deed, not being considered by him to stand on the same footing; and he repeatedly characterises it as having been the estate and inheritance of Samuel Rolle, probably from its having come by inheritance to Samuel Rolle,—a circumstance which he appears to have considered as entitled to considerable weight, and which seems to have formed the chief

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inducement to the making of this deed. It is in the nature of a testamentary deed, without any other parties to it than his own trustee, Joshua Sharp, and probably without any other person, except his legal advisers, being privy to its contents; not called for by any particular occasion, nor intended to have any [^72] immediate or binding \* operation during his life, but to govern the succession to the estate after his death, and particularly in the event which, being then single and unmarried, and at an advanced period of life, he appears to have anticipated, and which in a few years afterwards actually took effect, viz. his dying without issue. His sole object in making the deed was to provide for that event, by a settlement on his maternal heir, whom he considered entitled, as to this estate, to be preferred to his paternal heir. He addressed himself to the consideration of this subject (as was observed by the leading counsel for the plaintiffs in the first argument in this Court) with a moral feeling; not, however, with the moral feeling supposed by that learned counsel to effectuate the will of his grandfather, for in nothing done respecting this estate, since his acquisition of it, had he shown any such feeling. He had recently, by a recovery, destroyed the estate tail, and the remainders created by that will. In the introductory recital made of the will in this deed he omits any notice of the remainder over therein given to his cousins John and Samuel Rolle; and the new estate tail which he gives to himself differs from that given to himself by the will, being an estate in tail general, instead of an estate in tail male. His moral feeling was of another kind: it was as much opposed to any disposition which had been made by his grandfather, as it was to any limitation that he should himself make, by which what he considered to be the right of the heir of the Rolle line to succeed to the estate and inheritance of his ancestors, the Rolle's, might be defeated. His view in making the settlement was not merely to give a general preference to the Rolle line, but more particularly that at the appointed time, whoever was the right heir, whether one or many, male or female, married or single, young or old, on whom the law would have cast the inheritance by descent, had it been [\*73] transmitted \* from Samuel Rolle to his heirs, without the descent being broken, might thereby be enabled to succeed to the inheritance of his ancestor.

Lord Orford foresaw that this object could not be obtained,

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without a new settlement of the estate on the person who should succeed him as the heir of Samuel Rolle, in the event which he contemplated, viz. his death without issue; because in that event the two lines of Orford and Rolle would no longer be united, and the estate, if he should die seised of the fee recently acquired by the recovery, must descend to his paternal heir of the line of Orford, to the exclusion of the line of Rolle. To prevent this, and to secure the succession in that event to the succeeding right heir of Samuel Rolle, was the sole object of the settlement, and to effectuate which every part of it is directed. The intention is here put out of all doubt, by the solicitude of the settlor to record it himself on the face of the deed, in a recital of unusual detail, in which he expressly states his object, and the reasons for it, not certainly anticipating the doubts that have been thrown on his meaning, for then he would have obviated them by some express word in the operative part, but from a desire, probably, that the deed should carry on the face of it the reasons for the provisions contained in it. It was natural for Lord Orford to wish that his own illustrious family, and particularly his future paternal heir, a near relative with whom he had no difference, should be informed in this mode of the reasons why this part of his property was selected from the rest, to be disposed of by a separate deed, or why, in respect to it, a preference was given to an unknown and comparatively obscure maternal relation, over his successors in the earldom.

\* Lord Orford begins the recital with the subject which [\* 74] laid the foundation for the deed, and created its necessity, the double line of ancestry, paternal and maternal, of which he was then the representative, the line of Orford and the line of Rolle: one, the line through which he had received the estate (as he proceeds to show); the other, that to which the estate must descend as his paternal heirs, in case he continued to hold the fee (which he shows himself to have recently obtained by the recovery), and suffered it to pass by descent. He marks his decided preference with reference to the subject of his intended disposition, of the maternal to the paternal line, by noticing only one link in the one, which sufficiently pointed out who would be his paternal heir; but tracing the other through several links up to his maternal ancestor, Theophilus Clinton, Earl of Lincoln and Baron Clinton, marking, particularly, his own connection of heirship

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with Samuel Rolle, being the only child and heir of his mother, and she the only child and heir of Samuel Rolle. Having stated the history of his title to the estate under the will of Samuel Rolle, the recovery suffered, and that the uses of it were declared to himself in fee, he proceeds to state his main object, to which all the preceding statement was introductory, anticipating the effect of this acquisition of the fee on the future descent, and marking, in the way of contrast, by the emphatic word "but," the course of succession, in which he preferably wished the estate to go. "But the said George, Earl of Orford, is willing and desirous that the premises should continue and remain in the family and blood of the said Samuel Rolle." (*Vide* 2 B. & Ald. 627, where the deed is stated at length.) His anxiety on this subject leads him to repeat the same idea in the witnessing part.

"This indenture witnesseth that for and in consideration [\*75] of \*the natural love and affection which the said George,

Earl of Orford, hath and beareth unto his relations, the heirs of the said Samuel Rolle, and to the intent that the manors, &c., may remain, continue, and be in the family and blood of his late mother, the said Margaret, Countess of Orford, on the side or part of her said father." The limitations which follow evidently show the same intention, and are framed with a view to the same object. He conveys the whole estate to Joshua Sharpe, his heirs and assigns, to the uses after limited; and he then declares the uses in the following terms: "To the use and behoof of the said George, Earl of Orford, for and during his natural life, without impeachment of, and with full power to do and commit any manner of waste on the said premises, or any part or parts thereof, and from and after his decease to the use and behoof of the heirs of the body of him, the said George, Earl of Orford, lawfully to be begotten." Thus far the deed is in exact conformity to the purpose declared in the recital, to secure the continuance of the estate in the family and blood of Samuel Rolle. Lord Orford having first transferred his whole interest in the estate to his trustee, takes back to himself an estate tail, instead of his prior estate in fee. Being himself the heir of Samuel Rolle, his continuing to hold the estate for his life was consistent with this object, which was not to transfer the estate into the family of Rolle, but that it should remain and continue therein. The transmission to his issue, if he had any, was also compatible with, and

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a necessary furtherance of, the same purpose, as they, like him, must in succession be the heirs of that family. So long as the estate tail, created by this limitation, continued to exist, no one could succeed to the Rolle estate who did not represent the line of Rolle.

\* That Lord Orford's sole object in the deed was a transfer of the ultimate fee from himself to the future heir of the Rolle family, and that the reduction of his own interest therein, from a fee to an estate tail, was with this object only, is proved by the subsequent limitations. In this settlement of the fee he took care to part only with the descendible quality, reserving to himself every present right of absolute enjoyment and the full dominion over the estate. Before the limitation of the fee, therefore, he reserves to himself the power of introducing any new uses which any subsequent event or change of purpose might induce him to prefer,—a power perfectly natural and proper if he meant himself to have only a partial and limited interest in the estate, but wholly superfluous and unnecessary if he had intended a restitution of the fee to himself by the next limitation. The same observations apply to the power of revocation and appointment of new uses, reserved in the largest terms by the proviso which follows the next limitation.

The principal, and, indeed, in a manner, the sole purpose for which the deed was made, still remained to be provided for, to which all that had hitherto been done was merely introductory and subservient.

The limitation which follows next is, "in default of such declaration, limitation, direction, or appointment, to the use of the right heirs of the said S. R. for ever, and to, for, and upon no other use, intent, or purpose whatsoever." The contingencies upon which the remainder in fee was to take effect, having taken place by the death of George, Earl of Orford, on the fifth of December, 1791, without issue, and without having executed any new appointment under the power, or revoked the uses of his sett'ement, the question is, who became entitled to succeed to the estate \* under the terms of the limitation? "to the right heirs of Samuel Rolle for ever, and to no other use, intent, or purpose whatsoever." There is no doubt that the words "right heirs," in this limitation, are words of purchase, and not of limitation, no antecedent estate of freehold having been given

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by the deed to Samuel Rolle. There is no doubt that, in order to take as such purchaser, the person must fully and correctly answer the description contained in the limitation, and, consequently, that no person could become qualified who did not possess the character of the right heir of Samuel Rolle. But the doubt arises from the subject-matter of the limitation: had it been the grant of an immediate estate of freehold in possession, no doubt could have arisen as to the person meant to be designated by the words "right heir of Samuel Rolle." As the freehold could not be in abeyance, it must have vested, if at all, immediately in the person who was at the time of the execution of the deed the right heir of Samuel Rolle. But there does not exist the same necessity in the case of a remainder, which may be granted at the option of the grantor, either as a vested remainder to a present existing character, or as a contingent remainder to one not in existence, or not ascertained, provided such character be in existence and ascertained at or before the determination of the preceding estate.

The sole purpose and design of the deed was to prevent the estate going, in the event and at the period stated, to Lord Orford's own paternal heir, and to carry it to his maternal. Upon this point the MASTER OF THE ROLLS gives his decided opinion, "That Lord Orford had the intention which is ascribed to him (namely, so to settle his estate as to carry it to his relations on the mother's side, in default of issue of his own body), there can

I think, be no reasonable doubt." The MASTER OF THE ROLLS shows how incontrovertibly this point is estab-

[\*78] \*lished by Lord Orford's own declaration in the recital of the deed. We have, therefore, according to this great authority, a clear manifestation of Lord Orford's intent on the face of the deed, in a way to exclude all reasonable doubt, as to all the points now in question: 1st, the event for which it was the intent of Lord Orford to provide by this settlement, namely, "the default of issue of Lord Orford's own body;" 2ndly, the description of person to whom he intended his estate should be carried in this event, namely, "his relations on the mother's side;" and, 3rdly, the means by which he intended it should be carried, namely, "by this settlement," and, consequently, by the limitation now under consideration, there being no other in the settlement that applies to or has any operation in this event. It is also clear, as the same

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authority points out, that “if the limitation operates in the manner contended for by the plaintiffs, this intention will be wholly defeated; for it will carry the estate to the paternal uncle, who had in him none of the blood of Margaret, Countess of Orford, Earl George’s mother.” This effect and operation of the limitation follows, as the inevitable consequence of allowing the construction to be governed solely by a rigid application of legal import and presumption. Instead of carrying the estate, as it is admitted it was intended to do, in the appointed period and event, to the maternal in exclusion of the paternal heir, and to no other use or purpose whatsoever, it is made to carry it at that time and event to the paternal, to the perpetual exclusion of the maternal heir; and the estate, instead of being continued in the line of Rolle, is for ever transferred out of that line, into another that is a total stranger both in family and blood. On the other hand, upon the assumption that the technical rule respecting vesting does not apply to this case, and that the term, “right \* heirs,” in this limitation ought, under all the circumstances and notwithstanding the legal presumption, to be construed a description intended to refer, not to the present time and person, but to the future period and character, viz. the death and failure of issue of Lord Orford, and to the person possessing at that time and event the character of right heir of Samuel Rolle, none of the mischiefs, admitted to be the consequence of the opposite construction, will take place. The deed will be made consistent, intelligible, and operative in all its parts, an object always to be aimed at, if, by any construction, it can be attained. The intention of the grantor will be carried into execution, in exact conformity to his own recorded and undoubted declaration of it, in co-operation with the plan and effect of the other limitations in the deed.

The main difficulties, however, belonging to this case remain to be considered. The question still is, as the MASTER OF THE ROLLS observes, “whether the Court can mould the words of the deed so as to carry the intention into execution?”

After the most attentive consideration which I have been able to give to the subject, I cannot say, notwithstanding the unfeigned deference I feel for the preponderance of authority in favour of the construction contended for by the plaintiffs, that I am prepared to adopt and act upon it without further revision. I cannot say that

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the question is not attended with a sufficient degree of difficulty and doubt to render a further consideration necessary; or that I have myself been able to overcome the objections to the plaintiff's construction. If I had now finally to decide the question upon my own opinion, laying aside all regard to the authority on either side, I feel strongly disposed to concur in the opinion which [\*80] Mr. Justice BAYLEY has expressed, in respect to \* both the points upon which the question has been shown to depend, namely, the rule of construction applicable to a limitation, such as the one now under consideration, and the intention and meaning of the author of it. I shall state the reasons for this concurrence under both the heads. Under the first, I think, with Mr. Justice BAYLEY, that the rule of construction upon which the plaintiff's rely is not absolute and universal, but qualified and admitting of exception; that it prevails only when the actual intention and meaning is not sufficiently and clearly manifested on the face of the instrument, and ceases to operate when the particular intention and meaning is so manifested. I concur with him that a limitation, by way of remainder, to the heirs or children of a person deceased, is not necessarily confined to such persons as are within that description at the time that limitation was created. I cannot discover any satisfactory ground why it should be so confined upon principle, and I do not find it established to be so, by any authority before the present case.

In discussing the first question, respecting the application of the legal presumption to the construction of the words "right heirs," in the limitation, in preference to and in exclusion of all consideration of the intent with which these words are used by Lord Orford, and the meaning which he annexed to them, I assume, for the sake of the argument, that under the next head the fact will be made out that the intention and meaning of Lord Orford was such as Mr. Justice BAYLEY has declared it in his opinion to have been, reserving that point for separate consideration. Unless that fact be satisfactorily established, there is certainly nothing to prevent the operation of the ordinary rule of construction. But those who insist on the binding force of the rule, without regard to intention, and even in opposition [\*81] \* to it, if it could be established by the means proposed, must be prepared to go the length of contending for the paramount ascendancy and effect of their rule, even under the

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admission that a contrary meaning and intention could, in fact, be established.

It is clear from the subject of the grant that the remainder might be given to the person sustaining the character of right heir, at either of two periods; namely, either at the time when the remainder was created (which person, for the sake of distinction, may be termed the present right heir), or at the time when the remainder was to take effect on the determination of the prior estate tail (which last person may be termed the future right heir). The description may, consistently with the words, refer to either period, and will, therefore, admit of being referred to either by suppletory inference. In the absence of any secondary proof of intention being afforded by the deed, to supply the meaning thus left imperfect, the law steps in to supply the meaning by presumption, in favour of vesting in an existing present character, in preference to the estate falling into abeyance, with all the other objections to a contingent remainder; but this is only when the grantor himself has been totally silent on the subject, and has afforded no means on the face of the deed to discover his meaning on the point in question. If his meaning (which must be the object of inquiry), though not communicated in express terms in the operative part of the deed, is communicated in the other parts of it, so that by coupling them with the operative words the defect may be supplied, and the entire meaning of the grantor, both as to the character and the period referred to in his description, satisfactorily and clearly ascertained, what objection can be made to such a mode of ascertaining the meaning of the grantor?

If one part of a deed is dubious or imperfect, why \* may [\* 82] not the other parts be resorted to, to explain it? If the actual meaning thus ascertained is found not to coincide with that which legal presumption would alone have supplied, the result is, that the meaning in this particular case differs from what upon general principles would have been supposed to be the meaning. Is the Court to persevere in adherence to a supposition, when it is in the particular case proved to be ill founded? The legal presumption can only be a presumption of the unexpressed meaning of the grantor, for from thence alone can the title of any person to take as donee be derived. But that presumption, like every other presumption, can avail only till rebutted by proof to the contrary; and in this case the argument supposes that the contrary can be

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proved by sufficient manifestation, if the other parts of the deed are permitted to be resorted to and coupled with the operative part, and the construction drawn from their united effect. When the real meaning of the donor is ascertained as to the description and character of his donee, how can the Court receive or act upon any presumption of a contrary meaning? To take as a purchaser under a deed, the claimant must exactly and fully answer the description in the grant. How could the present right heir answer the description, which is thus proved to have had reference to the future right heir? On the same principle that the recital in the present case is not permitted to show the meaning of Lord Orford in the use of the words "right heirs" in the operative part of the deed, its operation might have been resisted had it contained a direct and express anticipation and disclaimer of the legal construction, and a substitution of the meaning in which the words were intended to be used.

That there does exist a rule of construction applicable to limitations of this nature, in many cases of a peremptory and [<sup>\* 83]</sup> inflexible obligation, by which \* the Court is bound to construe the remainder created by it, to be a vested remainder in the person possessing the character at the time of its creation, is not disputed; neither is it insisted that to give it that effect the actual intention of the framer of the deed should be manifested by any express word in the limitation. Without any word of present import, the law will supply it by presumption in favour of vesting. It is sufficient that a contrary intent is not expressed or shown. But the question is, whether there is any rule imposing the same obligatory construction, in a case where the terms of the limitation are general, not specifying by any express words whether the character is to be present or future, and when coupling the limitation with the other parts of the deed, the intention in favour of the future character is satisfactorily and clearly demonstrated. The insertion of a single word of future import in the limitation, in addition to the term "right heirs," as the word "then," or any similar expression would, it is admitted, have prevented the remainders vesting in the present right heir, and make it a contingent remainder to the future heir. Why so? Because the intention of the grantor, thus manifested in express terms, is allowed to govern the construction and effect of the limitation. If intention, then, is the criterion when thus mani-

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fested, why is it not to be so when manifested equally as to the proof of the fact, and unexceptionably as to the mode of proof in another way? Can the effect which intention, when ascertained, is to have, depend on the mode in which it is ascertained? Can it make any difference whether it be ascertained by the express or implied sense of the operative words? Here, however, care must be taken to attend to the distinction between this and limitations differently worded. In some, the operative words are such as to be capable only of one meaning, and contain in themselves a full, perfect, and unambiguous \* description of the person [\* 84] or character, without requiring any addition to render it complete, or admitting of any explanation or qualification. In others, as in the present case, the description, if confined to the literal import of the words themselves, is imperfect, and necessarily must have some addition made to render the meaning complete. The description is, on the face of it, ambiguous and equivocal, admitting of two interpretations, without anything in the words themselves to determine which of the two is the one intended by the framer of the instrument.

In the first case, to resort to and to act upon the intention of the framer of the deed, however clearly ascertained, as a guide to determine what should be the meaning and effect of the limitation, would be inadmissible; because it would not be to expound the operative words of the limitation (which is the proper duty of the Court), making use of intention to supply or explain the meaning (neither of which is required in the case put), but to set up an implied meaning collected from intention, in opposition to the declared meaning afforded by the operative words; to substitute one meaning in the place of the other, in a case where the two meanings are irreconcilably at variance. The Court must decide which of the two is to be preferred, the unexecuted intent, or the solemn act and deed. To prefer the former to the latter would be doing what the MASTER OF THE ROLLS so strongly and justly condemns, as a departure from the proper office and duty of the Court, when employed in the exposition of deeds.

But in the latter instance, of a limitation where the words are in themselves imperfect or ambiguous, the case is very different. In such a case resort must be had to matter extrinsic to the limitation itself, for the \* purpose of completing and ascertaining the meaning, or the deed would become inoperative [\* 85]

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and void, which is always, if possible, to be prevented. No alteration is thereby made in the operative words. Their meaning, as far as they are capable of affording any, is adopted; but additional information being necessary to supply the defect, and remove the ambiguity of the description, resort is had to the next best sources of information, viz. the context, and the nature of and circumstances attending the gift, as they appear in other parts of the deed.

Before we can decide upon the true construction of this limitation, it is essentially necessary to consider what the limitation is, as framed by the grantor, and what is the import of the words which it contains, before any addition is made to that import by either of the proposed modes, viz. legal presumption, or manifestation of particular meaning. Is the description contained in it of the right heir to be considered perfect or imperfect? Upon this point there can be no doubt: in whichever of the two modes the defect is to be supplied, the existence of the defect in the limitation, before the application of either mode, is admitted on both sides, and the consequent necessity of some auxiliary means of supplying it. During the discussion, this does not seem to have been sufficiently attended to; the limitation has been represented at one time as imperfect, requiring auxiliary means for its completion, and at another as complete and perfect, and therefore rejecting all explanation of its meaning. In seeking for the aid of legal presumption, to add to the term "right heir" the words "at the time of the execution of the deed," the limitation is necessarily admitted to be imperfect without such presumption; for in

the case of an express limitation, perfect in its description,  
[\* 86] no presumption of any kind could \* be required or be admissible. And yet, when the other mode of supplying the defect in the limitation is proposed to be referred to, viz. the manifestation of intent, the reference is resisted on the ground of the limitation being in itself perfect, unambiguous, and explicit. The words "right heirs of S. R." we are told, are words of plain and well-known legal import, and must, according to that import, denote the person who was heir at the time of the execution of the deed. To propose any change from that meaning is treated, as in effect, to propose an alteration in the words, as being no otherwise to be effectuated. "It is only because the words in their proper sense will not have the effect of accomplishing the purpose of the grantor, that their meaning is questioned. The argument is only

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that the grantor could not have meant to say that which he has plainly said." (2 Mer. 346.) These observations, it should seem, are such as could only apply to a limitation ranking under the head of one substantially perfect in itself, without any extrinsic aid.

If the words made use of by Lord O. in the limitation had really been such as above stated, if he had, in addition to the term "right heirs," inserted the words "at the time of the execution of the deed," all the above arguments against any addition, explanation, or substitution would have applied. It might then have been properly said, "Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba epressa fienda est." But the force of the argument is greatly diminished, if not entirely taken away, when it is observed that no such words, nor any of similar import, are to be found in the limitation, or in any part of this deed. "Non meus hic sermo," might Lord Orford say. The words which have this important \* effect are inserted by the expositor: it is the result of the application of legal inference and presumption. But this is taking for granted the whole question, viz. whether this is a case in which any such presumption ought to be applied. One of the two disputed modes of supplying the defect in the limitation is thus first resorted to as a matter of course, and then the effect produced by it on the limitation is made the argument for its preferable adoption. There is no doubt that, if legal presumption be applied, the effect will be to render the limitation perfect, clear, and unambiguous. The same may be said of the effect of applying intention as the criterion of explanation: only that the one will make it a perfect, clear, and unambiguous description of the present, the other of the future right heir. So far both the modes stand on an equal footing; but the preference due to the one or the other must depend on a different ground.

What is the character of this limitation, previous to the application of either of the modes proposed for supplying its meaning? It is altogether imperfect, and that in its main discriminating feature. It is equivocal and ambiguous, and, without some foreign aid extrinsic to the limitation, can afford no guide to determine which of the two right heirs was intended by the grantor to succeed to his estate. Laying aside inference and presumption, the words "right heirs of S. R." contain a general description of a person standing in that relation to S. R. at some time or other,

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but not necessarily at any particular time. It is a description of the character in the abstract, applicable to every right heir of S. R., past, present, or future, but not of necessity applying exclusively to any one in particular. The estate did belong to the past right heir, at the time of the deed was belonging to the [\* 88] then present right heir, and at a subsequent time \* would belong to the future right heir. Each is the right heir, but at a different time. Time is the discriminating feature. The character belongs equally to each in succession; time, therefore, or some other characteristic circumstance, must be added when either is to be identified. As it stands, it is a generic, not a specific, description: it wants all that is to give it particularity and identity; the *differentia*, the *accidens* (as the dialecticians term it), name, date, or circumstance, to denote what right heir is meant. Without such addition the description is wholly defective as a guide to fix the person intended. It will equally fit every right heir, but it characterises no one in particular. It will apply with equal propriety to Lord Clinton as to Lord Orford; for each, at a different time, was solely, exclusively, and correctly the right heir of S. R. Without some addition, therefore, to the description, no use can be made of it. To such a description, terms importing a freedom from all defect or ambiguity can with no propriety be applied.

Being the grant of a remainder, there is nothing in the subject of the grant to prevent its being granted, either to the person who was the right heir at the time of the creation of the remainder, or to the person who would be the right heir at the time appointed for its taking effect: the words of the limitation are open to either construction. The grantor has omitted by any express term to signify his meaning on this point, whether the remainder was to be a vested remainder in the present, or a contingent one to the future, right heir; whichever party succeeds, he cannot be said to derive his title under or in opposition to anything plainly said by the grantor. The grantor has been wholly silent on the subject. What is there that should prevent the Court in the [\* 89] construction of a limitation so \* imperfect on the face of it, in its most essential point, from adverting to and being governed by the other parts of the deed, if in them can be found, in respect of this point, a clear and sufficient manifestation of the grantor's unexpressed but implied meaning?

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To pronounce on the meaning of a detached part of or extract from an instrument, without referring to and comparing it with the other parts of the same instrument, if relating to the same subject, is contrary to every principle of correct interpretation, applied to any written instrument upon any subject; and it is particularly reprobated by all the authorities respecting the construction of legal instruments. Shepherd, in his "Touchstone," mentions it as one of the established rules for the exposition of deeds, "That the construction should be made upon the entire deed, so that one part do help to expound another, and that every part may take effect and none be rejected; that all the parts do agree together, and there be no discordance therein." We are to look (as it has been expressed) at the four corners of the instrument, and not to judge *per parcela*.

The legal presumption in favour of the present right heirs does not proceed on the ground of particular intention, but on principles of general application. It will prevail in the absence of any proof of a particular intent, or when that is not very clearly and sufficiently manifested. But when that is manifested, it is contrary to all principle that presumption should be allowed to operate in opposition to direct proof.

Every absolute owner of an estate has a right to dispose of it in any manner, and to any person or character he thinks fit, taking care only, in the exercise of \*his right, not to violate any rule of law. In the choice of his donee he is under no restraint: he may require from him the possession of any qualification or character, however novel and whimsical, as, in a reported instance of a gift to the first person who should come to St. Paul's. The law only requires that he should specify his appointment in terms sufficiently clear and explicit to enable the Court to discover with certainty who the person or character is whom he intended to appoint. The law cannot interfere further than to discover, by sound exposition, the intention of the grantor, and to give effect to it, provided it be agreeable to the rules of law.

Had this been the grant of a present estate in possession, it must have vested immediately on the execution of the deed; and therefore, if given to a right heir, could only have been given to the then present right heir. This is not so in the case of a remainder, where the complete title to and enjoyment of the estate cannot

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be transferred till the period and event fixed for the remainder to vest in possession. By that time the person or character to whom the remainder is given must be in existence and ascertained, but he need not before. The right, however, to the future estate may, and the law prefers that it should, immediately vest in some existing person or character the moment that it passes out of the grantor, and not continue in abeyance till the period and event is arrived for the remainder to take effect in possession. But it is wholly at the option of the grantor to determine to which of those descriptions of person or character his estate shall go at the appointed time.

If, therefore, it is found that the mind of Lord Orford, [\*91] as declared by his deed of gift, was that the \*remainder should, at the appointed time and event, go to the succeeding right heir, and not to the present, by that declaration the right must be conclusively bound. The mind, however, of the grantor must be clearly and sufficiently made known by his deed, in the expounding of which the Court is bound to adhere to established rules of exposition, from which it never ought to depart, to favour the exigency of a particular case, however urgent the call may be. These rules require that certain forms should be observed, especially in deeds; and it is of infinite importance, in order to afford a certain permanent and fixed guide in the titles to real property, that these forms should not be sacrificed from any feeling of the hardship that may be produced in a particular case. It was the desire to preserve inviolate the great landmarks of real property that seems to have operated on the majority of the great authorities in this case, requiring a rigid and inflexible adherence to what they considered to be an established rule of construction.

But what are the established rules for the exposition of deeds, and what the limits imposed by them to the adherence to technical terms? For the reasons before mentioned, they are required to be observed to a certain extent, but never so as to interfere with the more important rules, in favour of what Lord HARDWICKE terms the truth and justice of the case.

The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object to the discovery and effectuating of which all the rules of construction, properly so called, are uniformly directed. When technical words or phrases are made use of, the strong presump-

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tion is that the party intended to use them according to their \* correct technical meaning; but this is not conclusive [<sup>\* 92</sup>] evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially, from ignorance or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known, must be the guide, or the act and deed would be not the act and deed of the party, but of the Court. Because the words, which are the signs of the ideas of the persons using them, are in general, and in the correct use of them, the signs of ideas different from those of which, in the particular case, they are found less technically and correctly, but with equal certainty, to be the signs: can it follow that they are to be construed to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the Court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found, in which technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient, to get over the presumption in favour of legal construction. The paramount regard to be had, in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction. If the subject of the instrument on which the question arises be one that is not matter of law (over which intention \* has no control), but depends wholly on the will and act of the party, such as the appointment by a donor in a deed of gift of his own donee; if the words to be construed are not words of limitation (in which a stricter attention to forms may be required, especially in deeds), but words of purchase and description made use of to designate the person of the first taker; in such case, if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the

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object of grant, and if the words which he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or *dictum* to be found which requires the Court to adopt the technical sense, in opposition to the actual meaning of the party: on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form.

These principles are sanctioned by all the authorities: they will be found in the rules laid down by Shepherd, in his "Touchstone," for the construction of deeds, and in the cases by which he illustrates them. The case in which a grant in fee by a lord, of the services to a person who is tenant for life, although it may inure by way of release and extinguishment, shall, because this is contrary to the intent, be taken for a suspension only of the services during the life of the tenant for life; and also that in which a grant by tenant for life to a stranger for life is held an estate during the life of the grantor; and the other instances, where general words in a grant will be restrained, contrary to their legal import, to prevent forfeiture, are strong and decisive authorities in favour of these principles, and apply directly to the present case. In all those cases the limitation was expressed in terms, the sense of which was at least as unambiguous, [\*94] \*and the legal effect as clear, as the present, yet it was not considered that the Court was thereby precluded from adverting to circumstances extrinsic to the limitation itself, and moulding the operation of it accordingly, though in direct opposition to what, independent of those circumstances, would have been the settled legal effect.

Another authority to the same effect is that of Sir WILLIAM BLACKSTONE (Harg. Law Tracts, p. 489; Jur. Ex., vol. iii. p. 381), and it is still more explicit and decisive. That great and learned Judge has left a valuable exposition of the law on this subject, and the reasons and principles on which it is founded, distinguished by that perspicuity and discrimination for which his writings are so eminently characterised. It was a judgment, printed from his own manuscript, delivered in the cause in which the struggle for predominance between intention and legal operation and import, so much engaged the highest opinions in and out of Westminster Hall. It was a judgment on the very point now under consideration, delivered in a Court of Appeal, after all the

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light thrown upon it, not only from the resources of a mind so improved and well informed, but likewise from all the learning and reflection which the long discussion of the subject had drawn forth from the Bar and the Bench.

“I conceive,” says Sir W. BLACKSTONE, “that the great and fundamental maxim upon which the construction of every devise must depend is, that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rule of law, and no farther.” “If it did not go so far, it would be an infringement of that liberty of disposing of a man’s own property, which is the most powerful incentive to

\* honest industry, and is therefore essential to a free and [\*95] commercial country: if it went farther, every man would make a law for himself; the metes and boundaries of property would be vague and indeterminate, which must end in its total insecurity. But there is, I will acknowledge, a distinction to be made, though too often confounded or forgotten, in what is meant by those rules of law, which must co-operate with the intention of the testator, in order to effectuate his devise. Some of these rules are of an essential, permanent, and substantial kind, and may justly be considered as the indelible landmarks of property, irrevocably established by the well-weighed policy of the law, which have stood the test of ages, and which cannot be exceeded or transgressed by any intention of the testator, be it never so clear and manifest.” “These, and a multitude of other fundamental rules of property in this kingdom, are founded on the great principles of public convenience or necessity, and therefore cannot be shaken or disturbed by any whim or caprice of a testator, however fully or emphatically expressed.”

“But there are also certain other rules of a more arbitrary, technical, and artificial kind, which are not so sacred as these, being founded upon no great principles of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of parties, by annexing particular ideas of property to particular modes of expression; so that when a testator makes use of any of those technical modes of expression, it is evidence, *prima facie*, that he means to express the self-same thing which the law expresses by the self-same form of words.”

He mentions then a third class, which he terms “mere maxims of positive law, deduced by legal reasoning \* from [\*96]

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some or other of those great fundamental principles;" and adds, "But some of these rules, of the second and third class, are rules of a more flexible nature than those of the preceding kind, and admit of many exceptions; whereas those admit of none. For, if the intention of the testator be clearly and manifestly contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator. This has been clear law for four centuries at least, if not longer. It is said by the Judges, in 9 Hen. VI., fol. 24, that a devise is marvellous in its operations; and many instances are given where it may countervail the ordinary rules of law. The like doctrine is to be met with in every reporter since, and is the same that obtained in equity for the construction of uses before the statute. In the case of uses, says Lord BACON (Of Uses, 308, 8vo edit.), the CHANCELLOR will consult with the rules of law, where the intention of the parties does not specially appear. But then this intention of the testator, which is to ride over and control the legal operation of his own words, must be "manifest and certain, and not obscure or doubtful," as was resolved by all the Judges of England in *Wild's Case*, 6 Co. Rep. 16; or, according to the emphatical words of Lord HOBART, "the intent must not be conjectural, but by declaration plain," 6 Co. Rep. 33: which words of Lord HOBART, as they are adopted and construed by Lord HARDWICKE, in *Gurth v. Baldwin*, 2 Ves. 646, must mean, "plain expression, or necessary implication of his intent." But if that intent be uncertain, if it be in *aequilibrio*, or even in suspense or doubt, then (he afterwards adds) the legal operation of the words must take effect."

[\* 97] \* The judgment of Mr. Justice BLACKSTONE is founded on these principles. He divides the case into two heads: 1st, "What is the legal and technical import of the words made use of in this devise;" next, "whether there is any plain and manifest intention of the testator to be gathered from any part of his will, which may control and overrule the legal operation of the words, and at the same time be consistent with the fundamental and immutable rules of law."

He states the reasons which in that case induced him to be of opinion that there was not a sufficient manifestation of intent to control the legal operation of the words. But a judgment so founded virtually decides in favour of a contrary result, when the

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intent is sufficiently manifested, and is an authoritative recognition of the qualified nature of the rule in favour of legal and technical import. The only distinction that can be taken between that case and the present is, that the one arose upon a will, the other on a deed. But the rule of construction to be applied to a subject like the present, to ascertain the meaning of words used by a donor to describe the person of his donee, must be the same in both cases. Intention is equally the guide in both. This is proved by the rules and cases cited from Shepherd, and it is expressly stated by Lord MANSFIELD, in *Goodtitle d. Weston v. Burtenshaw*, that, with the exception of its being required that legal words of limitation should be technically expressed, the Courts are as much bound to give effect to the intention of contracting parties in a deed, as to that of a testator in a will. I conclude, therefore, that the judgment of Sir WILLIAM BLACKSTONE in *Perryn v. Blake*, Harg. Law Tracts, p. 489 [10 R. C. 689], affords another decisive authority, that in the construction of the words "right heirs" in the present case, the intention of Lord O. to describe the future right heir, if sufficiently manifested,

\* must get over the legal operation of the words in favour of [\* 98] the present right heir. These authorities, I should have thought, would have been deemed sufficient. But, considering the magnitude and importance of the case, and of the principle now under consideration, and the great weight and deference due to the contrary opinions, I shall proceed further in the consideration of the authorities cited on this leading point, particularly those referred to in the able judgment to which I have been called upon to direct my attention.

The opinion of Mr. Justice BULLER, in the case of *Ambrose v. Hodlyson*, Dougl. 337, has been cited and relied upon on both sides, and certainly there have been few Judges better qualified by acuteness of mind, legal research, and experience to form a correct judgment on such a question as the present; but if the whole of the opinion of this learned Judge is considered, it will be found to add another decisive authority for the limited and qualified extent of the rule in favour of technical meaning. In *Philipps v. Garth*, Brown, 68, Mr. Justice BULLER refers to his opinion given ten years before in the above case, and again recognises the doctrine which he had there laid down, and states that, although, when technical phrases are used, the Court is bound to

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understand them as such, yet, "if the testator uses other expressions in other parts of the will, which show he did not mean to use those phrases technically, then the intention must prevail."

Lord Chief Justice WILLES, in delivering the opinion of the Judges in the House of Lords, in the case of *Parkhurst v. Smith,*

Willes, Rep. 332, introduces it with a reference to the [\*99] general rules stated by Shepherd, and amongst these \* to

the one that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit; and he refers to the judgment of Lord Chief Justice HOBART, in *Earl of Clanrickard's Case*, Hob. 275, which also strongly marks the care that has been taken by the Judges in all times to discover, and to carry into execution, the real intention of the parties.

It has been insisted that the rules stated by Lord Chief Justice WILLES do not apply to such a case as the present, but only to a deed the words of which are doubtful; whereas in this limitation the words are unambiguous, and the legal effect clear. But this observation I have already considered. The ambiguity, in the present case, arises not from the words of which the limitation consists, but from the omission of some other word to give certainty and particularity to a general description; and this ambiguity is certainly as great as any that could have been created by doubtful expressions. If no limitation could be considered doubtful and explicable by reference to intent, which the application of legal operation and effect would render clear and unambiguous, no limitation would ever be open to explanation by intent.

The opinion of Lord Chief Justice HOLT, in the case of *Bath v. Montague*, 3 Ch. Ca. 106, was referred to, in confirmation of an argument that had before been insisted upon, that the effect of a deed does not depend on the recital, but on the limitations contained in the operative part, from whence alone the effect and operation is to be collected. The passage in Lord HOLT'S [\*100] judgment is as follows: "The reciting part of a deed \* is

not at all a necessary part, either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth. And that is plain and full, without any manner of contradiction whatsoever."

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But this opinion of Lord HOLT, instead of being an authority against the use made by the defendants of the recital in the deed of 1781, is, when properly considered, an authority in favour of it; because in that case there was a direct and irreconcilable variance between the recitals in the deed and the express limitations contained in it. The deed, Lord HOLT observes, "doth say it was made and intended to confirm the will, and yet makes several recitals and limitations contrary to it, disposing of the estate in terms express and positive, quite otherwise than the will doth." Had the limitations in the present deed been equally express and unequivocal, equally irreconcilable with the recital, had it, for instance, expressly given the remainder to the right heir at the time of the execution of the deed, the case of *Bath v. Montague* would have been applicable.

In the case of *Moore v. Macgrath*, Cowp. p. 9, Lord MANSFIELD and the Court of King's Bench considered themselves at liberty to go a step further in favour of intention collected from the recital in a deed, and to permit it to overcome general words in the limitation, even though expressly importing a different meaning. In that case, the grantor being seised of an estate in right of his wife, in the counties of Mayo and King's County, and also of a paternal estate in three other counties, in the recital of the deed of what he was about to settle specified only the \*estate [\*101] held in right of his wife, but in the granting part, after a particular specification of the estate in Mayo and King's County, he added, "Together with all other the said Michael Morris's lands, tenements, and hereditaments in the kingdom of Ireland." The Court decided unanimously that the paternal estate did not pass; and Lord MANSFIELD, in giving judgment, makes this observation: "The deed begins with the preamble usual in all settlements, that is, by reciting what it is that the grantor intends to do; and that, like the preamble to an Act of Parliament, is the key to what comes afterwards." Though the literal meaning of the words was free from any doubt, the Court did not consider themselves precluded from examining into and acting upon the real intention, as it might be collected by inference from the language of the recital, in opposition to the express import of the words.

I conclude from these authorities (to which many more of similar import might have been added) that the law on this sub-

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ject is completely settled, and the rules of construction, both of deeds and wills, established in a way not to be shaken: that though there is always a strong presumption in favour of technical meaning and inference, yet it is no more than a presumption; that it is not necessarily and universally binding and conclusive, but subject to be controlled by the manifestation of a contrary intent: that the primary object of inquiry is the intention of the party; and that where that is, on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the Court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference.

[\* 102] \* Before I quit this subject, however, it will be proper to consider the two cases which are cited in the printed report of the judgment of the MASTER OF THE ROLLS in support of his opinion. The one of these is the case of *Goodtitle* on dem. of *Bailey v. Pugh*. The other the case of *Seymour v. Boreman*.

The question in the first of these cases turned upon the construction of a clause in a will, by which the testator, after the decease of his wife, and for want of heirs of the sons of his son (to which sons he had limited his estate), devised it over in the following terms: "To the right heirs of me, the testator, Calvert Bear, for ever, my son excepted, it being my will he shall have no part of my estate, real or personal." The testator left this son and three daughters, and upon the death of the son without issue the question was, whether, on the death of the testator, this remainder in fee had passed to the daughters under this devise, or, for want of being disposed of, had descended upon the son and heir-at-law. The Court of King's Bench thought that the words entitled the daughters to take as *personae designatae*, and accordingly decided in their favour. The House of Lords were of a different opinion, and considered that the daughters were not sufficiently described by the words which the testator had used. They thought the will was wholly inoperative; that though the son was excepted from the inheritance, yet that the will contained no devise to any one except to the right heirs of the testator, and consequently could not entitle any one to take under it by devise or purchase. Considering the ground on which this case was decided, it is difficult to see how it can have any bearing on the

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present. The principle by which the present case is to be governed never did or could come under consideration. It was no conflict like the present, between manifest intention and \* technical meaning or inference, nor any instance of the [\* 103] predominance of the latter over the former. There was no intention expressed with respect to the daughters, and that which was declared with respect to the son, in consequence of his being the heir-at-law, was of no avail.

The MASTER OF THE ROLLS seems not to have adverted to this important difference between the two cases. He appears to have considered the intention equally manifested in the one case as in the other, and that there were no greater obstacles to carrying it into execution. But his mode of reasoning does not appear to me to make out either of those propositions. “That the testator (he observes) could not mean his son to take under the denomination of right heir is, at least, as manifest as that Lord Orford did not mean to limit the estate to himself, under the appellation of the right heir of Samuel Rolle. The alteration suggested, as expressive of the testator’s intent, in that case was not at all stronger than that which is here proposed. It was as easy to say that the testator meant such person as would be right heir if his son were dead, as to say that, by the limitation in this case is meant such person as would have been right heir if Lord Orford had been dead, or such person as should be right heir at his death, or such person as should be right heir on the failure of his issue.” (2 Mer. 349, pp. 583, 587, *ante.*) The mistake in this comparative view of the two cases appears to arise from not sufficiently considering how differently they are circumstanced, as to the main feature in both; viz., the manifestation of intention, by which the construction is to be governed. To prove an analogy between the two cases, it should have been shown that the testator \* in the one case [\* 104] had manifested the same intention in favour of his daughters as Lord Orford has in the present case in favour of the future right heir. But this is not attempted to be shown, nor could it be. The judgment of the House of Lords decisively negatived the existence of any such intention; and on this head the MASTER OF THE ROLLS is silent. The intention to which his observation is confined is of a totally different nature, and applies to a different object. It is the intention of the testator to exclude his son from the inheritance; not an intention to devise it to his daughters.

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This intention is certainly very explicitly declared, and was not defeated or interfered with by the House of Lords, so far as it could by law operate; but this intention, circumstanced as that case was, could not affect the title of either of the contending parties. It could not establish the devise to the daughters, nor take away the right of descent from the son.

The present case differs in both these respects. The manifestation of Lord Orford's intention not to limit the estate to himself, under the appellation of the right heir of Samuel Rolle, is alone, when established in fact, decisive of the title of both the contending parties; because both claim under the application of those words, neither having any other title. When, therefore, the words (which must have been intended to apply either to the one or the other, and which may apply to either) are ascertained not to have been applied to one of the right heirs; not only is the title of the party claiming under that application thereby negatived, but the words being, by necessary implication, made to apply to the other right heir, his title becomes established. *Erelusio unius est expressio alterius.* The negative intention would, therefore, circumstanced as the present case is, be alone decisive of [\* 105] the whole question, if there were no \* proof of any other.

But that is not the case. The intention of Lord Orford, in favour of his maternal heir, and his design to settle the estate upon him, in the event of his (Lord Orford's) dying without issue, is admitted to be a fact upon which there can be no reasonable doubt. Here, then, the intention is proved both positively and negatively, and either would alone have been decisive of the case. On the subject of intention, therefore, the cases appear to be entirely dissimilar. There is an equal dissimilitude under the next head of comparison. In the one case an alteration is proposed both in the words and meaning of the framer of the instrument. In the other there is no alteration of either. The words proposed to be substituted in the place of those which the testator had made use of were not such as were synonymous, differing in form, but agreeing in substance. They contain a meaning totally different. Under one set of words no person (according to the decision of the House of Lords) took any estate by devise or purchase. The effect of the substituted words would have been to enable the daughters to take the estate by purchase. The meaning of the former, therefore, is directly contrary to that of the

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latter. No such alteration, or any other, either in the words or meaning of the grantor, is proposed to be made in the present case. No word is changed, nor the meaning of any word; but the addition to the meaning, which technical inference would in general raise in such a limitation, in the absence of any proof of a contrary intent, is in this instance made to give way to the clear proof of contrary intention, in conformity to what has been shown to be, under such circumstances, the settled rule of construction.

In the other case of *Seymour v. Boreman*, a son of the second marriage claimed to take, under the appellation \* of [\* 106] heir male of the body of the father and mother, while there was a son of the first marriage living. The LORD KEEPER said the limitation was defective at law, and the plaintiff could have no remedy there; but according to the true meaning of the marriage agreement, he was well described to take the rent. From whence the MASTER OF THE ROLLS infers that it was by virtue of the contract only, that the Court was enabled to put upon the word "heirs" a sense which, legally and strictly, it did not bear. But in the present case he says there is no contract enabling the Court to deal with the words according to the original intention of the parties. The first answer to this case is, that supposing the report from whence this account of it is taken to be correct, and the ground on which the party claiming under this description had failed at law, and brought his case into equity, to have been what the LORD KEEPER says it was; supposing, too, that the decision of the Court of law had never been shaken by any subsequent authority, yet it would not have applied to the present case, because in this no such question arises. It is not contended, on behalf of Lord Clinton, that any use or application of the term "right heirs" should be made in his favour, different from what it correctly and properly bears; the only dispute is as to the time to which the description refers.

Although the decision that it is not necessary to be very heir, to enable a person to take by purchase, under the description of heir male or heir female, would not, if it had continued to be the rule of construction, have applied to the present case; yet a contrary decision on that point affords a strong authority the other way, for it presents a strong instance of the predominance of intent over technical meaning, and even over a fixed rule of construction. But the point has been long settled, \* in a [\* 107]

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class of cases of which *Seymour v. Boreman* is one. If the person to whom the description was intended to apply be ascertained, the necessity of being very heir has long been dispensed with. The case of *Pybus v. Mitford*, in 1675, in which the opinion of Lord HALE was delivered in a Court of law on this point, in the construction of a covenant to stand seised (1 Ventr. 378), arose only a few years after the case of *Seymour v. Boreman*, which case was not cited; and Lord HALE refers to a former case decided the same way in the time of Elizabeth. In the case last observed upon (*Goodtitle dem. Bailey v. Pugh*) Lord MANSFIELD, in the year 1784, considered the point to be settled. The point was decided in 1770, by the Court of King's Bench, in *Wills v. Palmer*, 5 Burr. 2615, after three arguments, not in a contract but upon a will. So by the Court of Common Pleas, in *Baker v. Wall*, Lord Raym. 185, 1 Stra. 41; by the Courts of King's Bench and the Exchequer, in the case of *Evans dem. Burtenshaw v. Weston*, Fearne Cont. Rem. App. 570, in 1774, after three arguments in each Court; and in *Darhison v. Beaumont*, 1 P. W. 229, 1 Bro. P. C. 489, in 1713, by the House of Lords.

The learned editor of Coke Littleton, in an able review of all the cases on this subject, strongly contends for the contrary doctrine, upon the authority of the case of *Counden v. Clerk*, Moore, 860, Hob. 29, Jenk. 294, and other cases prior to those above cited. But he admits it to be established by the same authorities that the rule, though established, would give way if from the circumstances of the case a contrary intention appeared; and he endeavours to reconcile the ancient authorities by that [\*108] \* distinction. He states particularly that it was on this ground Lord HARDWICKE affirmed the decree of Lord COWPER, in *Newcomen v. Barkham*. His Lordship, he says, admitted Lord COKE's distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule. The conclusion drawn by the editor from all the cases is that the rule had prevailed, where the construction rested singly on the words "heirs female," and they stand unexplained by any other words or circumstances.

From this review of the cases on this subject it is evident that, in respect to the principle on which the construction of the present case depends, they all concur in its establishment. In opposition

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to the doctrine, supposed to prevail in a Court of law at the time of *Seymour v. Boreman*, that without a contract the necessity of being very heir could not be dispensed with, in a person claiming to take by purchase, the contrary is now clearly shown to be settled, by a uniform train of decisions, and a strong authority is thereby furnished for dispensing, even in a Court of law, with technical strictness, when, on the whole, the person appears to correspond with the description. And even in the cases that have recognised the rule as most peremptorily established, still it is admitted to be subject to the qualification contended for in the present case; the warmest advocate for the binding force of the rule does not contend for its operation further than where the technical words stand unexplained by any other words or circumstances.

Under the same head other cases might be cited where persons have been allowed to take by purchase under the word "heir," though not answering the technical \* sense of that word, [\* 109] such as *Long v. Beaumont*, 1 P. Wms. 229; *Goodright* dem. *Brocking v. White*, Bl. Rep. 1010; *Burchett v. Durdant*, 2 Ventr. 311.

The remaining argument for construing the term "right heir" in this limitation to be the person answering that description at the time of the execution of the deed is, that such construction is necessary, in order that the remainder created by this limitation may become a vested remainder. The answer to the argument derived from this consideration is the same that has been given to the general argument, derived from legal import and construction. It applies only to a case in which there is no sufficient manifestation of the particular intention. Whether a remainder is vested or contingent, must in every case depend on the previous question, whether the person to whom, or the event on which it is given, is certain and determinate, or uncertain and contingent; and that must always depend entirely on the will and act of the grantor. The Court has no rule by which it can beforehand determine who shall be the donee, or on what condition or event. It has only to find out what is in each case the meaning and intention of the grantor on each of those points; the option and exclusive right of decision resting wholly and absolutely with him. However strong the predilection of the law is in favour of a vested over a contingent remainder, yet if the intention of the grantor sufficiently appears to give the estate (as he may do) to a person or character not yet *in esse*, or ascertained, or upon a contingent event, the con-

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sequence necessarily follows that the remainder becomes contingent. It cannot become vested without an alteration in the terms of the grant, which the Court has no power to make.

[\*110] Vesting, \* vested, or contingent is the consequence, not the cause, of the description of person or event in the grant. It is to reverse the order of things to argue that the person or event should be fixed and certain, because the remainder is vested. The converse is the case. It becomes vested because granted to a fixed person and on a certain event.

It is true that the policy of the law is, on many accounts, in favour of vesting to prevent abeyance, to facilitate family arrangements, to secure the remainder for the person intended to be the donee, and prevent the intention of the grantor being defeated by forfeiture and other means. There is, therefore, always a bearing and presumption in favour of vesting, which will always determine the construction, when there is nothing either in the words of the instrument, or the circumstances of the case, to show a contrary intention. But there the effect of this presumption ends. It is never allowed to operate in any case in which the intention of the grantor is sufficiently manifested. If the particular intention does not appear, if the *indicia* of intention stand *in equilibrio*, if the words will admit of either construction, the law will always imply the intention to have been that which is most beneficial to the grantee, and most agreeable to the policy of the law. But that presumption cannot take place if a contrary intention appears, express or implied, either in the words of the instrument or the circumstances of the case. Those must be first examined, and their effect ascertained. If, therefore, in the present case, the manifestation of intent is established, as to the person to whom the remainder was given, if it be proved that Lord Orford meant by the terms of the grant to give it to a right heir not ascertained

at the time of the grant, but who would be when the re-[\*111] mainder was to vest in \* possession, no predilection for, or presumption in favour of vesting, can operate to change the person of the donee, or make the remainder vest in the person answering the right heir at the time of the deed. The question, therefore, of vested or contingent, resolves itself into and becomes dependent on the same point, which has been already considered, viz. the manifestation of the grantor's intention in respect to the person designated to be his grantee.

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It is said that if we read this limitation, without knowing who the person was that at the time answered the description of right heir, all would agree that it was a vested remainder in the then existing right heir; and generally, that a remainder to the heir of a deceased person is considered by every lawyer, and treated of in every book, as a vested remainder in the then existing heir. So it unquestionably is, if the limitation is considered nakedly by itself, without taking into consideration the other parts of the same instrument, or the circumstances of the case, from whence the legal presumption in favour of vesting may be rebutted, and a contrary intention shown to exist. And herein may be traced the cause of all the difference of opinion that has prevailed in respect to the construction of this limitation. It will be found to proceed entirely from the difference in the mode of considering the limitation, whether the attention is confined to the terms of it, without reference to the other parts of the deed, or the peculiar circumstances of the case, the character in which the grantor himself stood, the occasion of making the deed, and the object and purpose to be effectuated by it, from all which the intention of the grantor in this particular case is to be discovered; or whether, in ascertaining the construction, not only the terms of the limitation, but, likewise, all \*these other circumstances [\*112] are taken into consideration. The result of the former mode leads to the construction of the limitation being a vested remainder in the person answering the description of right heir at the time of the execution of the deed; of the latter, that of its being a contingent remainder to the person who should answer the description at the time, and in the event to which the limitation was evidently meant to refer. All the authorities upon this subject are in unison with this doctrine. The legal presumption in favour of vesting is never carried further. It is always a secondary and subordinate rule to that in favour of intention. The primary inquiry in every case is as to intention.

For the general principle the counsel on both sides refer to the case of *Doe v. Maxey*, 12 East, 604, in which Mr. Justice BAYLEY says, "It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator; but if it will admit of being considered as a vested remainder, the Court will always read it as such, because a contingent remainder is always liable to be

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defeated, and the intention of the testator thereby frustrated." The decision in that case proceeded entirely upon intention, and recognises the qualification of the rule in favour of it. The certificate of the same learned Judge in the present case affords a strong practical illustration of the mode in which the rule is to be applied.

Bacon's Abridgment, vol. v. p. 735, 2 Rolle's Abridgment, 415, 1 Coke's Rep. 95 and 103, and Plowden, 56, all stating that "where an estate is limited either by \*common law, or by way of use to one for life, or in tail, remainder to the right heirs of J. S., who is then dead, it is a good remainder, and vests presently in the person who is heir-at-law to J. S. by purchase," prove nothing but what is before admitted to be the general effect of such a limitation of a remainder to the heirs of a deceased person, considered by itself, without any other words or circumstances, from whence a different intention can be collected. There is, in such a case, nothing to show a future heir to have been referred to, except that the estate is not to go over to him till a future time; but that is a circumstance common to every remainder, and does not prevent the immediate vesting in interest, and consequently is not alone sufficient to get the better of the general presumption. But these authorities, for the reasons before given, do not determine, or in the least affect the present case. To sustain the point contended for by the plaintiffs, cases should have been adduced in which the presumption in favour of vesting was determined to prevail, notwithstanding, and in opposition to the circumstances of the case, and the other parts of the instrument, by which it was manifestly proved that such presumption would be contrary to the clear intention of the framer of it. On the contrary, it will be found established by all the authorities, that an intention clearly manifested not to vest will control the *prima facie* legal effect of a limitation, which, taken by itself, would create a vested remainder.

Every case in which, notwithstanding the limitation was of that nature, a reference to intent has been admitted as the criterion to determine the question of vested or not vested, whatever may

have been the decision, is an authority for this purpose. [\*114] In *Pyot v. \*Pyot*, 1 Ves. Sen. 335. Lord HARDWICKE seemed to consider the description of the nearest relation of the Pyots to refer to the time of the contingency happening, and to

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apply to such persons as should then be the testatrix's nearest relation of the Pyots. In *Bou v. Smith*, Cro. Eliz. 532, the resolution that the daughter, if unmarried, would have taken under the limitation of the remainder to the next of the testator's name, in preference to the son, to whom an estate tail had been given, must have been founded on the manifest intent of the testator controlling the legal import, by which the remainder would on his death have vested in the son. The answer to the *dictum* in *Jobson's Case*, Cro. Eliz. 576, as to what would have been the decision had the daughter been unmarried at the time of the testator's death, is that there was nothing which could in that case have operated to prevent the remainder becoming vested in her. *Teynham v. Webb*, 2 Ves. Sen. 198, though distinguishable from the present case, as relating to the vesting of portions, is yet a strong authority on this subject, as showing the necessity, in the opinion of Lord HARDWICKE, of considering the circumstances of the case, in order to determine the period at which vesting should take place, to answer the intention and object of the deed. Lord HARDWICKE begins with observing (what he states to be a material part of the case) that there is no particular time mentioned in the deed at which the portion is to vest: it is left at large, and must arise from construction. He then mentions four periods of vesting, and examines each by the test of their answering the intent of the grantor. As to one period, the execution of the deed, he says, "To construe this to relate to the time of the execution of the deed, and to vest then, would be \*absurd, and [\*115] plainly defeat the intent." As to another, he says, "The consequence would be contrary to the intent of the parties," and therefore he rejects it. As to a third, he thinks there would be a great deal of inconvenience in adopting it; and therefore he does not adopt it. And he finally concludes in favour of another period, in order to avoid all the inconveniences, and many absurdities, which, he says, would arise from construing this money absolutely vested at any of the other times.

In *Phillips v. Deakin*, 1 M. & S. 744, the Court, upon the ground of intention, decided that the limitations were contingent and suspended till the prior estates should be determined; and the counsel on both sides, *arguendo*, considered the question of vested or contingent to depend upon the intent of the testator, with a strong presumption only in favour of vesting.

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The question as to the effect of legal import, and the presumption in favour of vesting, and as to the period of time to which the description of heir should be referred, where there are no words of gift fixing any particular time, came under the consideration of Lord ALVANLEY, in the case of *Holloway v. Holloway*, 5 Ves. 399 (5 R. R. 81), and though that great Judge decided that in that case the remainder vested in the persons answering the description of heirs at the time of the death, yet it is evident from the reasoning used in the judgment that he considered the question to depend entirely upon intention, and that his decision in favour of the legal presumption proceeded entirely upon the ground that

there was not a sufficient manifestation of a contrary intent.

[\* 116] The whole of the judgment is important, and \* towards the conclusion of it his Lordship observes: "I cannot, upon that ground alone, that the daughter named in the will was one of the heirs-at-law, hold that heirs at a particular time were intended. My opinion is that there is not enough in this will to give the words any other than their *prima facie* construction,—heirs-at-law at his own death. If so, it would be a vested interest in the persons answering that description at his own death."

The case of *Driver v. Frank*, 3 M. & S. 25, affirmed on appeal, 6 Price, 41, 2 Moore, 519 (15 R. R. 385), determined in 1814, affords a strong recent authority for the acknowledged predominance of intention, when sufficiently expressed, over the legal presumption in favour of vesting. The Judges of the Court of King's Bench, though differing as to the application of the principle, yet all concur in admitting its existence, and their reasoning is entirely built upon it. That was a devise of real estates to Bacon Franks for life, and after his death to his second, third, and fourth sons in tail: at the death of the testatrix there was no son of B. F. in existence; four were afterwards born; two of whom were *in esse* together; the elder of these two died during the existence of the particular estate. The tenant for life died, at which time there was no second son, the second having become an eldest. It was determined by a majority of the Judges, Lord ELLENBOROUGH, Chief Justice, dissenting, that the remainder vested in him, when second and younger son, and did not afterwards divest. The reasoning, however, of the three Judges who held it a vested remainder proceeds entirely upon the intention of the testatrix. They all rest their decision upon the ground that the intention

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to suspend vesting \* till the determination of the particular estate was not sufficiently expressed or implied: all agreeing that if such intention had been sufficiently expressed it would have controlled the legal presumption in favour of vesting.

In a still more recent case, *Doe d. King v. Frost*, 3 B. & Ald. 546 (22 R. R. 478), the same Court decided in favour of intention, against the legal presumption in favour of vesting, making on that ground the term "heirs" refer not to the time of the death of the testator, but to a future contingency.

These authorities appear to me to remove the main difficulty in the present case, as they relieve the Court from the necessity, which was contended to be imposed on it, of adopting implicitly, in the construction of the limitation in question, the technical meaning and legal operation of the words, without being at liberty to examine into the real intention and meaning of the party using them. They clearly prove that the question is open to that examination, and may be determined by it. They show that a measure and limit is set to the rule in favour of technical import and meaning. It is not an absolute universal and conclusive rule, but subject in all cases to be controlled by intention when that sufficiently appears. The question then in the present case is reduced to this single point. Legal inference and presumption is admitted to be in favour of the construction contended for by the plaintiffs; and that presumption must prevail, unless it can be rebutted by clear and sufficient proof of a contrary intention. Does that proof exist in this case? I am clearly of opinion that it does. Before entering into a statement of the reasons which have induced me to come \* to this conclusion, and [\* 118] which it will only be necessary to do very briefly, as they have been already in a great measure anticipated, it will be proper to premise, that in order to overcome the presumption in favour of technical meaning, and control the legal operation of the words of an instrument, it is not necessary that a contrary intention, to use the words in a different sense, should be declared in express words. It is necessary that it should manifestly and plainly appear, but that it may from the other parts of the instrument, and from all the circumstances of the case, as satisfactorily as if declared in express terms. An intention may be implied as well as expressed, if the implication be attended with the same certainty. The reasoning of all the Judges in all the cases referred

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to has proceeded on this principle. In none was there a direct expression of intention; but the argument for and against the intention rests in every case upon an examination of the circumstances, and the consequences following upon either of the interpretations proposed.

In respect to the general intent and purpose, no case has ever existed, and it is difficult to conceive any to exist, which affords more explicit, certain, and authoritative information than the present, because it is given in a minute and unusual detail by the grantor himself on the face of the deed, in which is disclosed not only what was about to be done, but the reasons why the deed was made, the circumstances that occasioned it, the object which it was to effectuate, and the mode in which that object was to be attained. And on this part of the case the explicit opinion given by the late MASTER OF THE ROLLS (in which I entirely concur) makes it unnecessary to dwell. "That Lord Orford (he observes)

had the intention which is ascribed to him" (that is, an  
[\*119] intention so to settle the estate as to carry \* it to his relations on his mother's side, in default of issue of his own body), "there can, I think, be no reasonable doubt." He refers to the preamble, in which this intention is clearly manifested. It is, therefore, not a case of conjectural intention, not in suspense or doubt, but of declaration plain, clear, and certain. Thus far we proceed on sure and safe ground, in which all are agreed. Still, however, a distinction is taken between the intention with which the deed was made, and the meaning of the words contained in it. And to this the inquiry must now be confined.

It has been shown that the limitation presents for examination two interpretations of the description contained in it, neither the words themselves, nor any rule of law necessarily deciding the question in favour of either. It has also been shown that in such a case, legal inference, though entitled to great weight, is not the sole criterion to govern the construction. That the intention and meaning may and ought to be primarily consulted; and if sufficiently manifested, must have the preference. This being the principle, there is, I conceive, little difficulty in the application of it. Examined by this test, it will, I think, clearly appear, both negatively, what was not the meaning of Lord Orford, and affirmatively, what was. The case affords abundantly sufficient evidence to show, 1st, that Lord Orford did not mean, by the

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terms made use of in this limitation, to give the remainder to the person answering the description of right heir of Samuel Rolle, at the time when the remainder was created; and 2ndly, that he did mean to give it to the person who should answer that description at the time and in the event when, if at all, the remainder was to take effect,—that is, after his own death and failure of issue. The first point is so clearly demonstrated by \* the [\* 120] other parts of the deed, and the circumstances of the case, that the contrary has never been attempted to be argued. It affords an unanswerable negative to such an intention that the person answering that description was Lord Orford, the grantor himself. Now, to suppose that Lord Orford meant to give the remainder to himself by this limitation is, when the circumstances attending the framing of it are considered, an argument of which it is not too much to say of it, that it amounts to a *reductio ad absurdum*. It would suppose Lord Orford to have entertained, at the same moment, intentions on the same points, directly opposite to and incompatible with each other; to provide in the same event for a course of succession directly the opposite to that which he declared himself desirous to effectuate.

The argument in favour of that construction has therefore never been put on this ground: it has rested entirely on the peremptory and irresistible effect of legal inference, laying aside all consideration of this characteristic and decisive feature of the case; viz., the circumstance of the grantor's being, and knowing himself to be, the sole heir of Samuel Rolle at the time of the grant. The general construction of such a limitation is avowedly adopted, just as if no such circumstance had existed. It is even insisted that such circumstance ought not to have any effect on the construction. "Supposing (it is said) we were to read this limitation, without knowing who the person was that answered the description, no doubt could possibly be raised upon its construction. All would agree that the then existing right heir would take a vested remainder; and it would be impossible to contend that this was a contingent remainder to such person as should at some future period answer the description. When it is found that Lord Orford is himself the present right \* heir, [\* 121] do the words therefore change their meaning? No: but they are unskillfully employed, and with the meaning that properly belongs to them, they will not effectuate the purpose which

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the framer of the instrument had in his contemplation." (2 Mer. 344.)

This passage shows the ground on which the argument for the construction in favour of the present right heir is placed. It is an entire and implicit reliance on legal inference, without allowing the circumstances of the case to have any weight. True it is, if we read the limitation separately by itself, without knowing who was the then right heir, or any reference to the circumstances, such will be the construction; but will there be the same universal admission of that construction if it is known who was the then present right heir, and if the other parts of the deed and all the circumstances of the case are considered? Legal inference is here put on the same footing as an express and unequivocal declaration. As applied to such a case, no alteration in the meaning could be produced by a knowledge of the person by whom the declaration was made. But does the same observation apply when the imported meaning is not the result of the words themselves, but of superadded inference? The additional idea suggested by inference originates not with the writer but his expositor; and being collected extrinsically by conjecture, may by extrinsic circumstances be rebutted. Take a familiar instance in the construction of the words "the true religion:" the expositor interprets it to mean the Christian religion; but would he persevere in that construction when he discovered the words to have come from a

Mahomedan? Do the words change their meaning when [122] that circumstance is discovered? No: \* but the erroneous inference of the expositor does, — and so it is in the present case. The donor could not intend to identify his donee by a character which he knew to apply at that time exclusively to himself. The same character must at a future time, viz. after the death and failure of issue of the grantor, belong to some other person, and that is the time to which the limitation refers. It does so expressly as to the transfer of the estate. It does so in this case by necessary implication as to the person. The time of reference is not expressed, but it is supplied by the context. If a person holding for his life a public character, which on his death would be held by some other person, — the Bishop of London, for instance, — were to make a grant by deed of land purchased by him for the purpose of being annexed to his see, to the use of himself for life, remainder to the Bishop of London. Could there be any

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doubt of the meaning being to grant the remainder, not to himself, but to the person who would, after his death, answer the description of this same character? Suppose Lord Orford, in the same deed of 1781, had given directions for his funeral, and had ordered that it should be attended by the right heir of Samuel Rolle, would not its being the language of the existing right heir, and relating to what was to be done after his death, have supplied by implication the proper epithet expressive of the real meaning? The description made by the present limitation relates entirely to a future indefinite period and event. The reservation to the grantor himself of the immediate uses was the object of the prior limitations. In this the whole subject, laying aside legal inference (which must not be mixed, as it has been with the present subject, viz. the meaning of the words themselves, independent of and before the application of legal inference), has a prospective and future aspect. The epithet denoting the time of reference

\* of the description naturally results from the subject- [\* 123] matter of the context, coupled with the other circumstances of the case.

One part of the deed is pointed out by the late MASTER OF THE ROLLS as tending strongly to negative that construction; viz., the use of the same terms in the recital of the deed, where it is evident that they could not be so interpreted. In the witnessing part the words are, "for and in consideration of the natural love and affection which the said George, Earl of Orford, had and bore unto his relations, the heirs of the said Samuel Rolle." The words "heirs of Samuel Rolle" are here used synonymously with "relations," and could not have meant Lord Orford himself; for he cannot be supposed to have been declaring as a consideration for the deed a natural love and affection for himself. It must have meant, in this place, some person or persons other than Lord Orford himself; and it is probable, as the late MASTER OF THE ROLLS observes, that Lord Orford used the words "heirs of Samuel Rolle" in one part of the deed in the same sense in which it is manifest he used them in another. I concur in this observation, though not in the further inference drawn from it. The MASTER OF THE ROLLS supposed Lord Orford to have had in view in both places, and to have meant to designate by these words, some existing person other than himself, and not future unascertained persons, who could not have been the objects of his natural love

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and affection. I cannot draw the same conclusion. The terms "natural love and affection" here used do not, I think, necessarily import personal knowledge or regard for any particular individual (who, if the intended object of grant, would probably have been specifically pointed out by name, and not left to be discovered

[\*124] without any clue to identify him), but are the common formulae applied to the \*consideration of blood, and inducing the consequent presumption of natural (not acquired) love and affection. This is continued permanently throughout the whole line of descendants, who must consist of future unascertained persons. The gift is expressly to the heirs of Samuel Rolle for ever. Lord Orford's attachment was not personal to any individual member of the family. The principle which dictated the preference, *quoad* the estates in question, extended to them all; "to the whole family and blood of his late mother, Margaret, Countess of Orford, on the side or part of her father, the said Samuel Rolle." The description by character only, and not by name, is the only description that could have been given if the future unascertained right heir was the person intended to be referred to; but it is not the natural way in which Lord Orford would have designated himself, nor is it the way in which Lord Orford describes himself in each of the preceding and subsequent limitations, intended to apply to himself, wherein, without any circumlocution or periphrasis, he is mentioned by his proper name and title, "George, Earl of Orford." Why should there have been this change in the description if the same person were throughout intended? Why should a less degree of particularity and certainty have been observed in limitations where, from their being followed with immediate execution, there was less danger of ambiguity or mistake than in one where the danger was greater, from the possibility of its effect being postponed to a remote futurity? Again, how are we, on this hypothesis, to account for the powers of appointment and revocation specially reserved to Lord Orford, in the limitations preceding and following the limitation in question?

Though it has not been argued that Lord Orford could have designedly used the term "right heir" in this [\*125] \*limitation in the technical sense, meaning thereby to designate himself, yet it has been suggested that he might have so done inadvertently, and under some mistake. Three con-

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jectures have been thrown out to account for this: 1st, That he might have supposed that a remainder vests in the persons who answer the description at the time when the preceding limitation expires; 2ndly, That he might have overlooked the circumstance of being himself the right heir of Samuel Rolle; and, 3rdly, That he might have conceived that the grantor could not himself be considered as the object of his own grant, and that the words would therefore designate such persons as would, if Lord Orford were out of the question, answer the description of right heirs of Samuel Rolle.

It does not appear to me that the Court would be warranted in adopting any of these conjectures, nor that any of them will account for Lord Orford's using the words in the sense supposed. The difficulty is rather increased than removed by them. They proceed upon the ground of imputing to Lord Orford a double mistake: first, in the mistaken use of the term; and, secondly, in being led into that mistake by the commission of a prior mistake. There is no evidence to show that he committed either mistake.

The first conjecture, instead of accounting for Lord Orford's using the term "right heir" to describe himself, would rather tend to establish the contrary conclusion. For if he adverted to the legal doctrine concerning the vesting of a remainder, and meant that the remainder should vest in the persons who answered the description at the time when the preceding limitations expired, he must have known that the only way of effectuating that intention was by settling the remainder accordingly, and making it a contingent remainder to the person answering \*the [\* 126] description at that time, and not a vested remainder in the person answering the description at the time when the deed was executed.

The second conjecture assumes, without any proof in support of it, a fact in itself in the highest degree improbable, and which is expressly contradicted by the recital of the deed. To suppose that Lord Orford should at any time have overlooked the circumstance of being himself the right heir of Samuel Rolle, his maternal grandfather, the heirship formed by only two links in the pedigree, and one individual only in each, Lord Orford, the only child of his mother, and she the only child of Samuel Rolle, would have been highly improbable; to suppose him to overlook this at the time and under the circumstances of this deed, when

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the circumstance of the heirship of Samuel Rolle formed the principal subject of his anxious attention, and the main reason for making the deed would be still more improbable; but to entertain or act upon such a conjecture, in the teeth of the recital of the deed, in which the connection by heirship with Samuel Rolle is the permanent and leading feature, expressly and repeatedly stated by the grantor himself, as the ground and foundation upon which the whole settlement was made, and that for the purpose of defeating and destroying the settlement, would be totally unwarrantable.

As to the third conjecture, if Lord Orford entertained the conception imputed to him, why should he not have acted upon it by an express and unequivocal designation of the person who was the object of his bounty rather than purposely misleading the construction by a designation of himself, which he is supposed to have known and intended to have been of no avail, and which could, therefore, only tend to present an apparent [\* 127] \* obstacle in the way of his intention, without any clue being afforded to explain or unravel the mystery?

There remains still to be noticed one ground of argument under the head of intention. To overcome the technical meaning, which legal inference annexes *prima facie* to the words "right heirs of Samuel Rolle," it is contended not to be sufficient to show a negative intention not to use the words in that sense. The *onus probandi* lies on the party resisting the meaning of legal inference, to show affirmatively, by clear and sufficient evidence, some other meaning in which the words were intended to be used. And this, it is said, both by the MASTER OF THE ROLLS and three of the Judges, to whom this question was referred, is not done in the present case.

I entirely concur, however, in the opinion of Mr. Justice BAYLEY, expressed in his certificate, that the meaning of Lord Orford in this limitation is, by sufficient evidence, shown to have been to grant the remainder, if he should make no appointment, to such person as at the expiration of the estate tail should be the right heir of Samuel Rolle in fee. First, because without any direct proof of actual meaning the Court would, I think, upon general principles, be bound to presume this to have been the meaning annexed by Lord Orford to the words which he has used. And, secondly, because the words themselves, coupled with the

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other parts of the deed, and the circumstances of the case, afford clear and sufficient evidence that such was, in fact, the actual meaning of Lord Orford in the use of these words.

As to the first ground, the Court having been put into possession of the intention with which the settlement \* was [\* 128] made, the purpose which it was to effectuate, and the description of person to whom, in the event in question, the estate was to be carried by it, and this by the declaration of the grantor himself, recorded on the face of the deed, so as to leave no reasonable doubt on the subject, and being called upon to expound a set of words, admitting equally of two interpretations; one of which, though conformable to what would be the *prima facie* technical meaning, yet, if adopted, would, in this case, have the effect of defeating the intention, disappointing the purpose, and transferring the estate from the person intended to be the grantee, to the very person intended to be excluded: the other, on the contrary, in every respect fulfilling and carrying into execution the declared object and purpose, in exact accordance with the recorded intention of the grantor,—the Court, I say, is, in such a case, bound by all the principles and authorities that have been referred to, affording the rule of construction, both of deeds and wills, to presume in favour of the latter meaning, and reject the former. By the same principles the Court is bound to form the same conclusion, from the effect which one interpretation has to render the deed nonsensical, inoperative, and void; the other to reconcile all the parts of it, and make them consistent and productive of their proper effect. *Ut res magis valcat quam pereat.*

Under the second head, when one of the two meanings of which the words are capable has been completely negatived, and proved to be such as the grantor could not have entertained, it follows as a necessary consequence that he must have entertained the other, unless, what is not to be supposed, the grantor used the words without any meaning at all. Of the two right heirs, the present and the future, \* either might have been the object [\* 129] of his grant in this limitation, if it be clearly proved that he did not mean the former, it necessarily follows that he must have meant the latter.

There is, besides, positive and direct evidence that this was his meaning. It is said “that it is only because this would have been the most proper limitation to effect the grantor’s object, that

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we are desired to say it is the limitation which he has actually made." Is not this a very sufficient reason for coming to this conclusion? As applied to express words that have a fixed and determinate meaning, no argument can be derived, from the consequences they produce, to change or affect their meaning; but it is not so where, as in this case, the words are doubtful and equivocal, where the sense is imperfect, where the sentence will admit of two interpretations: there the consequences which will ensue from either interpretation are properly considered to be a right criterion of the real meaning of the party. What better way can we have of ascertaining what was the actual meaning? Why are we to suppose the party to have preferred the meaning that would defeat his intention, destroy his deed, and carry the estate to a wrong person, to the one which will produce the contrary effect? The reasoning of Mr. Justice LAWRENCE, when assisting the Lord CHANCELLOR in *Leigh v. Leigh*, 15 Ves. 103 (10 R. R. 31), proceeds upon this principle. He says, that "in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies which may arise out of cases falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning." And after stating

that the testator could only have had one of two objects, [\*130] he \* adds, "That in order to ascertain whether the first of these two objects was that which the testator had in his view, the situation and circumstances of his family, at the time of making his will, have great weight."

If we have recourse to the same mode of reasoning in the present case, if, laying aside technical and artificial reasoning, we apply our minds to the unfettered consideration of every other test, by which the real meaning and intention of Lord Orford, in the limitation in question, can be ascertained, we shall be at no loss to discover what was the period to which he meant the description of the right heir of Samuel Rolle to be referred. There is no balance or opposition of testimony on this point. The whole plan and object of the settlement, as detailed in the recital, from the beginning to the end, the correspondence, order, and connection of all the parts of it, the purpose which it was to effectuate, the mode in which that purpose was to be effectuated, the nature of the limitation in question, the period of time and event to which it throughout solely relates, the terms in which the person

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is described, the object which the grantor had in view in the description, and the requisites which, according to that object, were made necessary to give a title under it, — all concur in the same implication; all tend to negative the inference, by which the epithet denoting a reference to the present time is added to the term “right heir,” and demonstrate the contrary inference, by which the epithet denoting a reference to the future time is to be inserted.

A doubt has been attempted to be raised respecting the precise period and event to which, on the execution \* of [\*131] the deed, the remainder to the right heir of Samuel Rolle was to be referred. The proper answer to this objection is, I think, given in the certificate of Mr. Justice BAYLEY. Subject to the power of appointment, the remainder is to the person or persons who should, at the expiration of the estate tail given by the prior limitation to George, Earl of Orford, answer the description of right heir of Samuel Rolle. The remainder, being subject to the power of appointment, creates a degree of uncertainty respecting it. But I have not thought it necessary to enter into the question raised at the Bar, whether on that account the remainder could be deemed a contingent one. I have proceeded on the assumption that the later authorities have set that question at rest. The existence, however, of the power of appointment ought not to furnish an argument on the other side, the remainder being upon another ground contingent; viz., from its being given to a person who is not ascertained at the time when the remainder is created, but who will be at the time when the particular estate is determined. The collateral maternal line of Rolle is to commence when the direct line ends by the death and failure of issue of George, Earl of Orford. At that time and event the remainder is to vest in possession in the person who is then the right heir of Samuel Rolle, but subject to the power of appointment, reserved by the prior limitation to the grantor, the Earl of Orford.

This is the opinion which, after long and repeated consideration, I have formed upon this question, and which, for the reasons before given, I have not thought it right to withhold. I have explained the grounds of it with, I fear, too much of prolixity and repetition, but from an anxiety that they may be examined, if it should \* be wished, by a higher and better tribunal. [\*132] The question, however, which is purely legal, is not now

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to be determined by this opinion. The single point made by the defendants, in respect to this part of the case, is, that the legal title ought not to be considered as finally and conclusively determined by the opinions which have hitherto been pronounced upon it; that it ought to be again submitted to the consideration of a Court of law. With my impressions on the subject, and considering the magnitude and importance of the question, and the difference of opinion that has prevailed respecting it amongst the learned Judges of the Court of law to which it was referred, I think a sufficient ground has been laid to call for that second reference. But before that is decided, it will be necessary to enter into the consideration of the other parts of the case. . . .

**Grey v. Pearson.**

26 L. J. Ch. 473-482 (s. c. 6 H. L. Cas. 61).

[473]      *Will. — Estate Tail. — Contingency. — Ultimate Limitation.*

A testator devised estates S. and H. to trustees on certain trusts, "and subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson Robert Watson and the heirs of his body; but in case he shall die under the age of twenty-one years and without issue, my said messuages or cottages at S. aforesaid (subject to the trusts hereinbefore respectively declared) shall be in trust for my granddaughter Ann Watson and the heirs of her body; but in case she shall die under the age of twenty-one and without issue, [474] the said last-mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my said messuage or dwelling-house and farm at S. aforesaid. And I declare that if my said grandson Robert Watson shall die under the age of twenty-one years and without issue," the trustees should be seized of the messuages and dwelling-house at S., in trust to pay the rents to two other persons for life, "and subject to the trusts hereinbefore declared, the messuage and farm at S. shall be in trust for D." The grandson attained twenty-one, and afterwards died without issue; the granddaughter likewise attained twenty-one and afterwards died without issue. *Held* (Lord ST. LEONARDS *dissentiente*) affirming the decree of the Court below, that the words of the will must be read as they stood, that in the events which had happened the ultimate limitation as to the H. estate had failed, and that estate had descended on the heir-at-law of the testator, but that the ultimate limitation of the S. estate continued in force.

This was an appeal against an order of Lord Chancellor CRANWORTH, which had varied a previous order of Vice-Chancellor TURNER. The question in this case depended on the construction

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of the will of Richard Watson the elder, late of Stainton, in Cleveland, in the county of York, and related to a freehold farm and six cottages situate at Hemlington, in the parish of Stainton, respectively devised by his will; and which, in the order of the LORD CHANCELLOR, are called, collectively, "The Hemlington Estate," in order to distinguish them from another estate, consisting of a messuage and farm in the parish of Stainton, also devised by his will; and which, for the sake of distinction, are in the same order called "The Stainton Estate." The testator, at the time of his death, was seised of both these estates in fee simple.

The will on which the question arose gave annuities to several persons, and then proceeded thus: "I give and devise the messuage or cottage situate at Stainton aforesaid, now in the occupation of the said Mary Chapman, unto her, the said Mary Chapman, for her life, and after her decease I devise the same in manner hereinafter mentioned; and I give and devise the freehold messuage or dwelling-house in Stainton aforesaid, now in my own occupation, with the orchard, garden, and garth to the same belonging, and my freehold farm situate in the township of Stainton aforesaid, now in the occupation of John Sherwood the younger, and my five freehold messuages or cottages situate in Stainton aforesaid, now in the several occupations of William Mewburn, Martha Eason, Thomas Moncaster, Thomas Sherwood, and Thomas Bradworth, respectively, and the said messuage or cottage in Stainton aforesaid, now in the occupation of the said Mary Chapman, but subject to and expectant upon her said life estate therein, and also my freehold messuage or dwelling-house and farm situate at Hemlington, in the parish of Stainton aforesaid, now in the occupation of the said John Sherwood, with the appurtenances to the same premises respectively belonging, unto and to the use of my grandson Robert Watson Darnell, of Monkwearmouth, in the said county of Durham, common brewer, and Watson Chapman, of Ravensworth Mill, in the county of York, miller, their heirs and assigns for ever; upon the trusts hereinafter declared concerning the same (that is to say): Upon trust by mortgage or sale of the same premises, or of a competent part thereof, or by and out of the rents and profits thereof, or by all or any of the same ways and means, to raise and levy and pay the several annuities or yearly sums of money hereinbefore given or provided for the said several annuitants, and at the times and manner

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hereby mentioned, during the continuance thereof respectively, and subject thereto, in trust, by all or any of the same ways and means to raise and levy and pay the sum of £2000 to my granddaughter Ann Watson, as and when she shall attain the age of twenty-one years, with such yearly sum in the meantime for her maintenance and education as hereinafter mentioned in lieu of the interest thereof: Provided that, in case my said granddaughter shall not live to attain that age, then the said legacy or sum

of £2000 shall not be raised or paid: and, subject to [\*475] \*the trusts aforesaid, all the said premises hereinbefore

devised shall be in trust for my grandson Robert Watson and the heirs of his body; but, in case he shall die under the age of twenty-one years and without issue, my said messuage or dwelling-house and farm at Hemlington aforesaid, and my said six messuages or cottages at Stainton aforesaid (subject to the trusts hereinbefore thereof respectively declared), shall be in trust for my said granddaughter Ann Watson, and the heirs of her body; but in case she shall die under the age of twenty-one years and without issue, the said last-mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my said messuage or dwelling house and farm at Stainton aforesaid; and I declare and direct that if my said grandson Robert Watson shall die under the age of twenty-one years and without issue, then and in that case the said Robert Watson Darnell and Watson Chapman, their heirs and assigns, shall stand and be seised of my said messuage or dwelling-house at Stainton aforesaid, now in my own occupation, and the said farm at Stainton aforesaid, now in the occupation of the said John Sherwood, upon the trusts following: (that is to say), in trust to pay the rents, issues, and profits of the same premises to or for the use of my said son Richard Watson for and during his natural life, at the same times and in like manner and subject to the same restrictions, control, and determination as are hereinafter mentioned or declared of or concerning the said annuity or yearly sum of £60 hereby provided for him as aforesaid; and from and after his decease, or other sooner determination of his life interest therein, in trust to pay the same rents, issues, and profits unto my said daughter-in-law Mary Watson, during her life, if she shall so long continue the widow of the said Richard Watson; and, subject to the trusts hereinbefore thereof declared, the said messuage and farm at

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Stainton aforesaid shall be in trust for my grandson William Darnell and the said Robert Watson Darnell and my grand daughter Elizabeth Darnell, in equal shares as tenants in common, their respective heirs and assigns for ever."

The testator's will also contained a power to appoint new trustees, and he thereby appointed Robert Watson Darnell and Watson Chapman his executors.

Ann Watson, the wife of the testator, died in his lifetime.

The testator died in August, 1817, without having revoked or altered his will, which was duly proved by his executors, Robert Watson Darnell and Watson Chapman.

Watson Chapman died in the month of December, 1824, leaving his co-executor and co-trustee Robert Watson Darnell him surviving, and Rutter was appointed trustee in the place of Watson Chapman.

The testator left Richard Watson his only surviving son and heir-at-law, and his grandchildren Robert Watson and Ann Watson, who were the only children of Richard Watson, him surviving.

The testator also left surviving, his daughter-in-law Mary Watson, who died in the month of March, 1831, and his sister Mary Chapman, who died in the month of June, 1832.

The grandson Robert Watson attained his age of twenty-one years in May, 1829, and entered into possession of the hereditaments devised to him by the testator, and so continued until his death in 1848, but he never in any manner barred, or attempted to bar, his equitable estate tail in these hereditaments. He was never married.

The testator's son Richard Watson died in the month of August, 1844, intestate, and leaving his son Robert Watson his heir-at-law.

Robert Watson made his will in July, 1843, and devised all his real estates and personal estate to his sister Ann Watson, her executors, &c., for ever, and he appointed her the sole executrix of his will, which she duly proved.

Ann Watson, upon the death of her brother, entered into the possession of all the hereditaments devised to him by the testator, and continued in such possession until her death, but never barred, or attempted to bar, her estate tail in the hereditaments devised to her by the testator Richard Watson. She died in February, 1849,

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above age, but unmarried. She made her will, dated the 25th of November, 1848, whereby she devised all her lands and hereditaments situate in the several townships, precincts, or territories of Stainton and Hemlington, in Cleveland, or [476] in the parish of Stainton aforesaid, and all other her real estate whatsoever, to William Hill (since deceased), and William Pearson, their heirs and assigns, upon trust to sell the same, and to stand possessed of the proceeds to pay the several legacies thereinbefore given, and she gave the residue of such proceeds to William Hill and the respondent William Pearson, their respective executors, administrators, and assigns, for their respective proper use and benefit; she appointed them her executors, and they duly proved her will.

William Pearson and William Hill (since deceased) filed their bill in 1850, against William Rutter and others (the now appellants), and, claiming through the heir-at-law of the testator, prayed that it might be declared that in the events which had happened the limitations in the will had become inoperative, and that they, as representing the heir, were entitled to both estates; and that Rutter, who had been appointed a trustee of the will, and had become the surviving trustee thereof, might convey to them accordingly.

The cause was heard before Vice-Chancellor TURNER, who, by an order dated the 6th of December, 1852, dismissed the bill with costs, his Honour being of opinion that both estates still continued subject to the ultimate limitation contained in the will, and under which the appellants claimed and derived their title in the estates.

The plaintiffs appealed from this order; and by an order, dated the 11th of June, 1853, the LORD CHANCELLOR was pleased to vary the VICE-CHANCELLOR's order, and to declare in substance that, in the events which had happened, the Hemlington estate had descended to the heir-at-law of the testator, and that Pearson and Hill were entitled thereto; but that the ultimate limitation in the will of the Stainton estate continued in force, and that the appellants were respectively entitled thereto in manner therein mentioned. (3 De G., M. & G. 398.)

The present appeal was presented against that order.

Mr. Walker, Mr. Malins, and Mr. G. Y. Robson, for the appellants, contended that the rule of construction in *Brownsword v.*

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*Edwards*, 2 Ves. 243, must govern this case, and that the authority of that decision was not affected by that of *Doe d. Usher v. Jessep*, 12 East, 288 (11 R. R. 380), but that the latter was erroneous. They cited in illustration of this argument, *Woodward v. Glasbrook*, 2 Vern. 388; *Mortimer v. Hartley*, 3 De G. & Sm. 316, 19 L. J. C. P. 153, 6 C. B. 819, 20 L. J. Ex. 129, 6 Ex. 47; *Maberly v. Strode*, 3 Ves. 450 (4 R. R. 61); *Fingal v. Blake*, 2 Molloy, 50; *Fairfield v. Morgan*, 2 Bos. & P. (N. R.) 38 (9 R. R. 609); *Malcolm v. Taylor*, 2 Russ. & M. 416; *Lurford v. Cheeke*, 3 Lev. 125; *Turk v. Trencham*, Moore, 12, pl. 50; *Lethieullier v. Tracy*, 3 Atk. 774; *Spulling v. Spalding*, Cro. Car. 185; *Doe d. Lees v. Ford*, 2 El. & B. 970, 23 L. J. Q. B. 53; *Garde v. Garde*, 3 Dr. & W. 435; *Quicke v. Leach*, 13 M. & W. 218, 13 L. J. Ex. 348; *Key v. Key*, 4 De G., M. & G. 73, 22 L. J. Ch. 641.

Mr. Rolt and Mr. Faber, for the respondents, contended that the decision in *Doe d. Usher v. Jessep* was to be preferred to that of *Brownsword v. Edwards*, if the two cases should be found to be absolutely irreconcilable. They examined the cases already cited, and in addition referred to *Soulle v. Gerrard*, Cro. Eliz. 525; *Hilliard v. Jennings*, 1 Ld. Raym. 505; *Hilliard v. Jennings*, 12 Mod. 276; *Walsh v. Peterson*, 3 Atk. 193; *Denn d. Wilkins v. Kemeys*, 9 East, 366 (9 R. R. 581); *Right v. Day*, 16 East, 67 (14 R. R. 294); *Bellasis v. Uthwatt*, 1 Atk. 426; *Bradford v. Foley*, 1 Dougl. 63; *Sheffield v. Coventry*, 2 De G., M. & G. 551, 22 L. J. Ch. 499; *Doe v. Shippard*, 1 Dougl. 75; *Bell v. Phyn*, 7 Ves. 453 (6 R. R. 148).

March 16. The LORD CHANCELLOR moved the judgment of the House. [After very fully stating the facts, his Lordship said]: Had there been no previous decision, the question in this case would not in my mind have presented much difficulty.

\*The rule of construction adopted in modern times has [477] been to adhere strictly to the express words in a deed or will, and to give them their ordinary natural meaning, unless that meaning should be at variance with the context, or should produce a result plainly at variance with the intention of the testator. Would such a result follow from construing in this case the word "and" copulatively? I think it would not. An estate tail is given by the testator to R. Watson and the heirs of his body, so that, on attaining twenty-one, Robert would have the

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power of disposing of the property as he might think fit. Probably the testator knew that this would be the consequence of such a gift. If the grandson dies under twenty-one and without issue, the estate is to go over. That was not an irrational mode of disposing of the property, and therefore it may be supposed to be what the testator intended; and, consequently, if there had been no previous authority, I should have thought it quite clear that, in the events which have happened, there was no gift over. Then, has the mode of construing this will been affected by previous authorities? The cases are numerous. They begin with one in Cro. Eliz., and the doctrine there laid down was approved by this House in *Fairfield v. Morgan*. There it was held, that if the control of the fee simple is given to A. B., but if he dies under the age of twenty-one or without issue, then over, the word "or" must be read "and," since it could not be supposed that the testator gave such an estate to A. B., and yet meant to deprive A. B.'s issue of it, if it should happen that A. B., having issue, died under twenty-one. If that case was now to be decided for the first time, I should have my doubts about it; but such has been the construction put upon that particular form of devise for the purpose of giving effect to the presumed intention of the testator. Is there any equally well-established rule in the case of a devise to a person and the heirs of his body, with a limitation over, if he dies under twenty-one and without issue? Must he fulfil both conditions, or will the estate, if he should die at any time without issue, go over? To support the proposition that such a result must take place, much reliance was placed on *Brownword v. Edwards*. In that case there was a devise to trustees in fee, upon trust to receive the rents, till John Brownword should attain twenty-one, and if he should attain twenty-one or have issue, then to him and the heirs of his body; but if he should die under twenty-one and without issue, then to Sarah Brownword. John attained twenty-one, but died without issue; and Lord HARDWICKE held, that the remainder over took effect. Lord HARDWICKE thought there was an alternative gift, and that John Brownword did not fulfil the conditions of the alternative; and that, in any event, if John died without issue, it was to go over to Sarah. Lord HARDWICKE, speaking of those cases in which "or" has been held to mean "and," said: "There is no occasion to resort to that; but the Court would have made the

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construction I do now, viz. if he dies without issue before twenty-one, then over by way of executory devise; and if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder, because he had made his original devise capable of a proper remainder, in which case the Court will always construe it a remainder." It is not necessary for me absolutely to say that Lord HARDWICKE is not in that case rightly deciding: had it been necessary, I must have confessed that I think the decision not founded upon correct principles; because, though the words are not changed, it is implied that there was an intention to give a remainder, in case the estate tail took effect, whereas there are no words which express such intention. Here, however, there are words sufficient to give an estate tail, in the first instance, which was not the case there. The argument here would give the words "under twenty-one years" no meaning at all. I therefore say, that if the case of *Brownsword v. Edwards* was rightly decided, it was decided on principles not governing the present case. The precise view which I take of the law upon this subject was discussed in *Doe d. Usher v. Jessep*, in the Court of King's Bench in the year 1810; and I do not think that that case and the present are distinguishable from each other. In that case there was a devise to trustees, "to and for my \*natural [\*478] son, and the heirs of his body lawfully issuing, for ever;" and if he "shall happen to die before he attains his age of twenty-one years and without issue lawfully to be begotten, then I devise" over to persons who were the claimants. The son died after attaining twenty-one, but without issue. On the discussion of that case *Brownsword v. Edwards* was much relied on, and Lord ELLENBOROUGH said: "The cases certainly run very near; the only distinction seems to be, that the limitation over in *Brownsword v. Edwards* was in favour of a daughter, who, without such a construction as was there put on the word 'and,' would have been left without any provision; and here the limitation over is to other relatives." That is a distinction which it is impossible to understand as affecting the case, and was perhaps introduced to save the Court from directly overruling *Brownsword v. Edwards*. But Lord ELLENBOROUGH then goes on to say: "But is there not a rule of common sense, as strong as any case can be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would result

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from so construing them? Now, here the testator has used the copulative word ‘and,’ and has devised his estate over, in case his son died ‘before twenty-one and without issue,’ that is, if both those events happened. Why, then, should we read ‘and’ as ‘or,’ and give the estate over upon the happening of one only of the events, when no inconvenience will ensue by construing the word used in its natural sense?” I do not know that that case has ever been seriously questioned. When this case was before me, I thought that *Doe v. Jessep* had overruled *Brownsword v. Edwards*, and believing that it laid down a more convenient and sensible rule, I acted upon it; and I still think that my conclusion was a right one. A case had been decided just before the argument in the present case; but it was not quoted to me, as I suppose counsel were not aware of it. I allude to *Mortimer v. Hartley*, in the Exchequer, which, however, does not shake, but confirm, me in my decision. Estates tail were there given; and then it was said: “If it shall please God to take away both John and Ann under age or without leaving lawful issue, then to Joseph Waterman.” John attained full age and had issue, but the issue died in his lifetime; and it was held that the devisee over was entitled, for that “or” must have its natural meaning. One other argument was pressed at the bar of this House. Vice-Chancellor TURNER was of opinion that, *quâcunque viâ datu*, this estate was to go over to the ultimate devisees, for that in case the grandson died under the age of twenty-one, a life interest in Stainton was created, which life interest never took effect, but expired in the lifetime of the grandson. There was then a direction given, “and subject to the trusts thereof hereinbefore declared, the said messuage and farm at Stainton shall be in trust for” the Darnells, the persons litigating this case. That estate, therefore, went over. Then, in the devise of Hemlington, there was a declaration that if Robert, the grandson, died under twenty-one and without issue, it was to go to Ann and the heirs of her body; but that if she should die under twenty-one and without issue, then “the same trusts as are declared as to Stainton shall take effect as to Hemlington.” Now Vice-Chancellor TURNER thought that that carried over the Hemlington as well as the Stainton estate; but I could not agree to that, because the ultimate limitations declared as to Stainton are only to be applied to Hemlington in case both John and Anne died under twenty-one and without issue. Neither of

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them died under twenty-one, and there is no specific ultimate limitation of the Hemlington or of the Stainton estate; and the same considerations which induce me to say that when R. Watson had attained twenty-one there was no gift over which could take effect, induce me also to say that the ultimate trusts of the Stainton estate are not applicable to the Hemlington estate. I therefore move your Lordships that this judgment should be affirmed.

LORD ST. LEONARDS.—My Lords, I have the misfortune to differ both from my noble and learned friend on the woolsack, and from my noble and learned friend opposite, and I have therefore written out the opinion on which my advice to your \* Lordships is founded. The legal fee simple in this case is given to trustees upon the trusts after declared of the same. Upon the whole of the will I have arrived at the conclusion that the testator intended to dispose of the equitable fee simple, and not to die intestate as to any portion of it. There is no residuary devise, unless the declarations of trust operate as such. The testator did not intend that if his grandson Robert should die after attaining twenty-one, but without issue, to allow his estate to descend to his son in fee. The first trust is to the grandson and the heirs of his body, which is an equitable estate tail, but, in case the grandson shall die under twenty-one and without issue, then a part of the estate is to be in trust for the granddaughter and the heirs of her body, but if she shall die under twenty-one and without issue, over. The grandson attained twenty-one, but died without issue: he did not therefore die under twenty-one and without issue. There was an equitable estate tail to the grandson. Under the will no one could take until that estate tail was exhausted by the grandson's failure of issue, whenever that might happen, without reference to the period of his death. If the first devise had been to Robert the grandson in fee, the word "and" could not be read "or," but if "or" had been used, "and" must have been introduced in its stead, because the testator could not have intended to give the estate away from the heirs of Robert's body if Robert had happened to die before twenty-one leaving issue behind him. The general intent must govern, and in devises where the first taker, though confined by the testator in words to a life estate, has been held to take an estate tail under a subsequent gift to the "heirs of his body," the Courts have disregarded words annexed to "heirs of his body," such as that they were to take "as tenants

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in common," in favour of the general intention. Courts will strike words out of a will that are contrary to that general intention, and will supply them where the testator has failed to provide for the precise event which has happened. In *Newburgh v. Newburgh*, Law of Property, 367, in introducing gifts over in a will by an enumeration of the estates, the estate in one county was, by mistake, struck out by the conveyancer in settling the draft, but, in this house, that mistake was corrected on the evidence furnished by the general context of the will. So, in favour of general intention, "without being married" has been construed to be "without ever having been married." Here the primary intention of the testator was to give an estate tail to Robert, and we are not at liberty to cut it down or affect it in any way. That estate tail is only to go over in case the grandson died at any time without issue, and the rules of law are sufficient to give effect to that intention. The first case cited, *Soulle v. Gerrurd*, was decided when executory clauses were not allowed. The devise there was to the testator's son Richard in fee, "and if he died within the age of twenty-one or without issue," to be divided among the other sons. Richard died within age, leaving issue, and he was held to have an estate tail which did not go over on death alone, but it was required that the devisee should die without issue; and the case shows that where the first devise is expressly or by implication a devise in tail, a gift over in case the devisee shall die under twenty-one, or without issue, may be read without alteration, and yet a death under twenty-one will not carry the estate over, unless also there is a failure of issue. In *Woodward v. Glasbrook*, in a devise "die before twenty-one or unmarried," HOLT, J., appears to have held, that the words "shall die before twenty-one" were immaterial, but that the estate went over, when after attaining that age the devisee died "unmarried." Then we come to *Brownsworth v. Edwards*, which I consider a binding authority, and I entirely subscribe to it. I cannot distinguish it from the case before the House. [His Lordship here fully stated the case.] Plain intention was there held to govern, and on that ground Lord HARDWICKE saw it was necessary to do what the Courts had often done, namely, read one word for another, or transpose them, or make any change of that sort. The words "dying without issue"

were properly held to go through the whole sentence.  
[\*480] That construction ought to be applied to this case. \* Lord

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HARDWICKE did not convert “and” into “or,” though that might be done in favour of the intention of the testator, but by looking to the whole will he gave full effect to all the words and to the clear intention of the testator. The case of *Doe d. Usher v. Jessep* is like the present. There the Court of King’s Bench decided, in direct opposition to *Brownsword v. Edwards*, that “and” was to receive its natural construction, and though the first devise was to an infant in tail, yet the gift over, if he should happen to die under twenty-one without issue, required both events to happen as described, and the devise over was held to fail, as the first devisee attained twenty-one, although he died without issue. If there is a necessity to decide between the cases of *Brownsword v. Edwards* and *Doe v. Jessep*, the earlier authority ought to be supported. The other was not allowed to be fully argued, and the reasons given by the Judges show that it was not well considered. It so happened that while the present case was pending in Chancery a case of *Mortimer v. Hartley* was heard and decided in the Court of Exchequer, and that Court, in a deliberate and written judgment, delivered by Mr. Baron PARKE, recognised *Brownsword v. Edwards* as a binding authority, while *Doe v. Jessep* was passed over as of no weight; but, unfortunately, *Mortimer v. Hartley* was not referred to in the argument in the Court below. In that case successive estates tail were given to a son and a daughter, and the testator declared that if both of them should die under twenty-five, or without having lawful issue, he gave the estate to his brother in fee. The second devisee in tail died an infant and without issue, but the first attained twenty-five but died without issue. The Court of Exchequer relied on the gift being in tail, and recognised and followed the decision in *Brownsword v. Edwards*, and thus effectuated the intention of the testator. The ground on which this appeal is now to be dismissed carries us back to *Fairfield v. Morgan*. There, one word was substituted for another, and the word substituted is directly opposite in meaning to the one for which it is substituted, but it is substituted in order to carry into effect the intention of the testator. Here the intention of the testator is taken from the use of certain words alone, the consequence of adhering to those words being disregarded, though that consequence will certainly be to defeat what the general purport of the will shows to have been his intention. This decision will, therefore, go far to shake the authority of

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*Fairfield v. Morgan*, and to make Courts look superficially at the words in certain parts of a will rather than to take the whole context of it into consideration. Then, as to the second point, I confess to being unable to understand the distinction between the Stainton and the Hemlington estates. In considering this point, we assume that the limitations over were contingent, and that the contingency did not happen. The two estates were given to Robert "and the heirs of his body," "but in case he shall die under twenty-one and without issue" the Hemlington estate is to be in trust for Ann and the heirs of her body, while the Stainton estate is to be in trust to pay the rents to Richard for life, subject to conditions, and after the determination of his life interest to Richard's wife during her widowhood, and then "subject to the trusts hereinbefore declared" in trust for the Darnells. Now, what is the difference? The Hemlington estate is given first to Robert and the heirs of his body, then to Ann and the heirs of her body, "but in case she shall die under twenty-one and without issue," then "upon the same trusts as are hereinafter declared of my farm at Stainton" (we have seen what they are), and subject to those trusts to the Darnells. So that, in the events provided for, the two estates originally given to Robert would be reunited and go to the Darnells. The simple question is, whether the introduction, among the trusts of the Hemlington estate, of another limitation, with a contingent gift over in all respects similar to the one and with the like contingency which preceded the gift of Stainton, can vary the construction? Can it matter whether there be one contingent gift over or two such gifts? In either the gifts all follow a contingency, but that does not affect the ultimate trust which is not dependent on any contingency, but is only subject to the trusts before declared. I consider the decision as to the Stainton \* estate, of which I approve, as an authority for the like decision as to the Hemlington estate. On this point, therefore, I am of opinion that the decision of the Court below is erroneous, for there is really no distinction whatever as to the events on which the ultimate trust in regard to each estate is to take effect.

Lord WENSLEYDALE.—My Lords, I have paid the closest attention to this case, and to the arguments, and also to the opinion of my noble and learned friend opposite. I have fully considered the reasoning upon both sides, and have determined that I ought

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to concur in recommending your Lordships to affirm the order of my noble and learned friend on the woolsack, though with the hesitation one must naturally feel when such authorities disagree. I think my noble and learned friend right in the construction which he put upon the clause in the will on which this case depends. I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further. This is laid down by Mr. Justice BURTON in a very excellent opinion which is to be found in the case of *Warburton v. Loveland*, 1 Huds. & Brooke (Ir.) 648.<sup>1</sup> The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz. that which the testator intended to do, and that which is the meaning of the words he has used for the purpose of doing it. The will must be in writing, and the question is, what is the meaning of the words used in that writing? The words of the clause in question ought to be used in their ordinary sense, viz. that the trust estate was to go over on the happening of a double event. No absurdity or inconsistency would follow from that. Are we bound to read the expressions here as they were read by Lord HARDWICKE in *Brownword v. Edwards*? After hearing the observations of my noble and learned friend opposite, I, of course, feel great hesitation in arriving at an opposite conclusion. But the principle of construction seems to me clear, and where it is so, we are not bound, in a case depending on the construction of words, which always differ in different instruments, to follow a decision unless we think it agrees with that principle. If, by a course of decisions, certain words have acquired a particular signification, they must be so treated wherever they are found, because the framer of the instrument must be considered as so to have

<sup>1</sup> See the same case in error in the House of Lords, with Lord Chief Justice TINDAL's opinion on the same matter, 2 Dow & Cl. 480, delivered on behalf of all the Judges.

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used them. But where there is only one such decision, no necessity of the kind exists. In *Brownsword v. Edwards* Lord HARDWICKE so read the words as to treat them as creating a vested estate tail in the son, and then providing for the determination of that estate, the remainder went to the daughter. But the observation sometimes made, that Lord HARDWICKE read "and" as "or," is not correct, for that would have deprived the son's issue of the estate, had the son, though having issue, died before twenty-one; he avoided that difficulty by putting a forced construction on the words of the will. It may be doubted after all whether that will may not have been construed thus: that if the son should attain twenty-one "or" have issue, he should have an estate tail, but if he died under twenty-one "and" had no issue, the estate should go to the daughter. But, at all events, that case has not been uniformly followed. On the contrary, it was directly impugned by *Doe d. Usher v. Jessep*, which does not appear to me liable to the criticisms which, in this argument, have been made upon it. I think that the sound rule of construction was there laid down, and that we ought to abide by it. I therefore think that in the events which have happened here, none of the remainders have taken effect. Upon the second part of the case I think that the [\* 482] decision of the \* Court below was right; but as the part of the decree relating to Stainton is not appealed against, that point becomes immaterial.

The decree was affirmed; the appeal was dismissed, but no order was made as to costs.

#### ENGLISH NOTES.

The above judgments exhibit a curious contrast between the unanimity with which a leading principle of construction has been enunciated, and the diversity of opinion in applying it. It would be useless to multiply examples of cases where context has been admitted or has not been admitted to control the primary meaning of words. It seems more useful, after setting forth the above judgments at length, to cite some of the statements of principle which have been embodied in carefully chosen language.

The following propositions from the well-known book of Sir James Wigram on *Extrinsic Evidence*, although particularly expressed as relating to the interpretation of wills, may be cited as applying, with the necessary modifications, to the interpretation of written instruments generally: "I. A testator is always presumed to use the words in

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which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable."

In *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 877, Lord WENSLYDALE says: "It is a most important rule in the construction of the words used in a will, that technical terms, or words of known legal import, must have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is."

In *Ralph v. Carrick* (1879), 11 Ch. D. 873, 878, 48 L. J. Ch. 801, 804, COTTON, L. J., in making some general observations on the construction of wills, said: "We are bound to have regard to any rules that have been established by the Courts for the purpose of enabling us to say what the words used by the testator do mean, and subject to that, we are bound to consider the will as trained legal minds would do. . . . As lawyers, we must construe the will as we should construe any other document subject to this, that in wills, if we can find the intention, it is not necessary that technical words should be used for the purpose of giving effect to that intention, which would be necessary in some instruments."

Here may be recalled an observation frequently made by the late **MASTER OF THE ROLLS**, to the effect that in construing a gift of per-

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sonal estate he was not bound by way of precedent by any decision which did not rest on an intelligible principle; in construing a gift of real estate he was bound by precedent whether resting upon an intelligible ground or not, because titles to land depend on precedent.

As to the conditions on which extrinsic evidence is admissible in the construction of written instruments, they have been already considered under the head of "Ambiguity," Nos. 1-3 and notes, 2 R. C. 707-739.

#### AMERICAN NOTES.

The Rule correctly expresses the substance of judicial decision in this country. A valuable collection of authorities in point, accompanied by discreet comment, may be found in Mr. Jones' work on "Construction of Commercial and Trade Contracts," citing *Grey v. Pearson*, at p. 2. Kent says (2 Com., p. 553): "The rules which have been established for the better interpretation of contracts are the conclusions of good sense and sound logic applied to the agreement of the parties. Their object is to ascertain with precision the mutual understanding of the contract in a given case." In *Newell v. People*, 7 New York, 97, the Court say: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses," citing the first principal case, and pronouncing Sir Thomas PLUMER's opinion "a distinguished specimen of judicial argument and illustration." "The intention of the parties is to prevail, if not incompatible with some rule or maxim of law; this is considered as the polar star in expounding:" *Howard v. Rogers*, 4 Harris & Johnson (Maryland), 281; *Church v. Hubbard*, 2 Cranch (U. S. Sup. Ct.), 187; *Bradley v. Steam Packet Co.*, 13 Peters (U. S. Sup. Ct.), 89; *Mauran v. Bullus*, 16 ibid. 528. In *Field v. Leiter*, 118 Illinois, 26, the Court observed: "There are a few rules of construction commonly observed in construing all written instruments, whether specialties, simple contracts, or wills. One is, it is the duty of the Court, where it is practicable to do so, to discover and give effect to the intention of the parties so that performance of the contract or other instrument may be enforced according to the sense in which it was mutually understood at the time it was made, and greater regard is to be had to the clear intent, when ascertained, than to any particular words which may have been used in the expression of that intent. Another rule is, that such construction shall be adopted, if it consistently may be, as will render such contract or other instrument capable of execution, rather than to render it inoperative." See *Whitehurst v. Boyd*, 8 Alabama, 375; *Steele v. Branch*, 40 California, 3; *Brown v. Slater*, 16 Connecticut, 192; *People v. Gospers*, 3 Nebraska, 285; *Den v. Camp*, 19 New Jersey Law, 248.

In construing wills, the intent of the testator is the main point to be ascertained and effectuated, subject to rules of law. *Boisseau v. Aldridges*, 5 Leigh (Virginia), 222; 27 Am. Dec. 590; *Baskin's Appeal*, 3 Penn. State, 304; 45 Am. Dec. 641; *Doe v. Wynne*, 23 Mississippi, 251; 57 Am. Dec. 139; *Eatherly v. Eatherly*, 1 Coldwell (Tennessee), 461; 78 Am. Dec. 499; *Montgomery v. Millikin*, 5 Smedes & Marshall (Mississippi), 151; 43 Am. Dec. 507; *Bratt*,

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*Square Church v. Grant*, 3 Gray (Mass.), 142; 63 Am. Dec. 725; *Morrison v. Estate of Sessions*, 70 Michigan, 297; 14 Am. St. Rep. 500; *Greene v. Greene*, 125 New York, 506; 21 Am. St. Rep. 743; *Phelps v. Bates*, 54 Connecticut, 11; 1 Am. St. Rep. 92; *Shadden v. Hembree*, 17 Oregon, 14; *Dulany v. Middleton*, 72 Maryland, 67; *Bartlett v. Patton*, 33 West Virginia, 71; *Elliott v. Elliott*, 117 Indiana, 380; 10 Am. St. Rep. 54.

The rules of grammar will be applied, unless it is clear that words or phrases were incorrectly used. *Harper v. N. Y. City Ins. Co.*, 22 New York, 441; *Rush v. Carpenter*, 54 Iowa, 142; *Cushman v. North W. Ins. Co.*, 34 Maine, 487; *Russell v. Bondie*, 51 Michigan, 76; *Germania Ins. Co. v. Sherlock*, 25 Ohio State, 33.

Words in a will are presumed to have been used in their ordinary or primary sense, unless it appears from the context that they were used in some other sense, or unless by reference to extrinsic circumstances the use of the words in their primary sense would render the provisions of the will senseless or inoperative. *Mowatt v. Carow*, 7 Paige (N. Y. Chan.), 328; 32 Am. Dec. 611, holding that "children" may include grandchildren; *Hoope's Appeal*, 60 Penn. State, 220; 100 Am. Dec. 562, holding that school furniture was not embraced in "household furniture."

When the context of a will shows that the testator used words in a certain sense, this will be followed in preference to the meaning given in dictionaries or judicial decisions. *Carnagy v. Woodcock*, 2 Munford (Virginia), 231; 5 Am. Dec. 470, holding that books, liquors, &c. passed under "household furniture except my plate and watch;" *Stover & Barr's Appeal*, 2 Penn. State, 428; 45 Am. Dec. 608, holding that "survivors" meant personal representatives.

A testator is ordinarily presumed to have used words in their primary and usual sense: *Re Woodward*, 117 New York, 522; 7 Lawyers' Rep. Annotated, 367; but this is subject to the consideration of the whole will: *Boston Safe Deposit & T. Co. v. Coffin*, 152 Massachusetts, 95; 8 Lawyers' Rep. Annotated, 740.

The grammatical sense is not inflexibly regarded in the interpretation of wills, and words may be transposed if necessary to effectuate the obvious intention: *Covenhoven v. Shuler*, 2 Paige (N. Y. Chan.), 122; 21 Am. Dec. 73; *Re Woodward, supra*: or even rejected, or so restrained in their application as materially to change their literal meaning: *Whitcomb v. Rodman*, 156 Illinois, 116; 47 Am. St. Rep. 181, quoting from Chief Justice MARSHALL, in *Finley v. King's Lessee*, 3 Peters (U. S. Sup. Ct.), 346: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentences."

To ascertain the intention the whole instrument is to be taken together, and no part may be rejected if capable of effectuation in conformity with the intent: *Covenhoven v. Shuler, supra*; *Bakin's Appeal, supra*; and this is the uniform doctrine in this country in respect to all writings: see 2 Parsons on Contracts, 502, and *Stewart's Adm'r v. Lang*, 37 Penn. State, 201; *Rose v.*

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*Roberts*, 9 Minnesota, 119; *Varnum v. Thurston*, 17 Maryland, 490; *Goosey v. Goosey*, 48 Mississippi, 210; *Salmon Falls M. Co. v. Portsmouth Co.*, 46 New Hampshire, 249; *Goebel v. Wolf*, 113 New York, 405; 10 Am. St. Rep. 464; *Phelps v. Bates*, 54 Connecticut, 11; 1 Am. St. Rep. 92; *Dickison v. Dickison*, 138 Illinois, 541; 32 Am. St. Rep. 163; *Watkins v. Snadon*, 93 Kentucky, 501; 40 Am. St. Rep. 203; *L'Etourneau v. Henquenet*, 89 Michigan, 428; 28 Am. St. Rep. 310.

The intention of a testator must not be defeated because he has failed to clothe his ideas in technical language. *Bell County v. Alexander*, 22 Texas, 350; 73 Am. Dec. 238.

The rule that the whole paper must be considered, in respect to wills, is applied to agreements as well. “Effect must be given, if possible, to every part of an agreement, and it is only where there is an inconsistency or repugnancy which is totally irreconcilable, that a discrimination will be made as to which part will be made to yield to the other.” *Barhydt v. Ellis*, 45 New York, 107.

## SECTION II.—*Interpretation of Deeds, &c.*

### No. 3.—MYERS v. SARL

(1860.)

#### RULE.

WHERE the words employed in an instrument have, besides their ordinary and popular sense, also a peculiar and scientific meaning, in which they are used and understood by the class of persons engaging in transactions of the kind in question, parol evidence is admissible to show the usage and explain the meaning; and the intention to use the words in the peculiar sense will be inferred accordingly.

#### Myers v. Sarl.

30 L. J. Q. B. 9-15 (s. c. 3 El. & El. 306; 7 Jur. (N. S.) 97).

[?] *Evidence.—Admissibility of Parol Evidence to interpret Written Contract. Usage of Trade.*

In a contract under seal, by which the plaintiff contracted to build for the defendants a house and premises for a certain sum, it was provided that “no alterations or additions should be admitted unless directed by the defendants’ architect by writing under his hand, and a weekly account of the work done thereunder should be delivered to the architect every Monday next ensuing the

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performance of such work." In an action on the contract,—*Held*, that parol evidence was admissible to show that by the usage of the building trade "weekly accounts" meant accounts of the day work only, and did not extend to extra work capable of being measured.

Action to recover the balance due to the plaintiff on a building contract.

The cause was referred at Nisi Prius at the sittings in London after Trinity Term, 1858, and the arbitrator having, by the order of reference, "power to state a case for the opinion of the Court," made his award on the 6th of June, 1860, and stated the following

## CASE.

The plaintiff was a builder, and by a deed bearing date the 18th day of October, 1856, and executed by him and the defendants, he contracted and agreed with the defendants to erect and build for them a house and premises for the sum of £8697 upon the terms and subject to the stipulations and conditions contained in the said deed. The house and premises were built by the plaintiff, and certain extra works and fittings were done and provided by him in and about the same, and the action was brought to recover the sum of £3783 4s. 3d., being the balance claimed to be due on the contract and the value of such extra works and fittings, after giving credit to the defendants for all sums paid by them on account.

By the deed of contract it was provided, that "no alterations or additions should be admitted unless directed by the architect of the defendants in writing under his hand, and a weekly account of the work done thereunder should be delivered to the architect or the clerk of the works on every Monday next ensuing the performance of such work; and the delivery of such account should be a condition precedent to the right of the plaintiff to recover payment of any such addition or alteration."

It was contended, on behalf of the defendants, that the plaintiff was not entitled to recover for some of the extra work done by him, on the ground that the same was not directed to be done by the architect by any writing under his hand pursuant to the clause in the contract above set out, and also on the ground that no sufficient weekly account was delivered by the plaintiff within the meaning of that clause.

With respect to the latter objection, it appeared in evidence that

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certain accounts of the extra work were delivered by the plaintiff as and for weekly accounts within the meaning of the contract; and it was contended on his behalf that the term "weekly accounts," as used in the contract, was a term of art well known in the building trade, and to all builders and architects, and that parol testimony was admissible to prove its meaning. The admissibility of such evidence was objected to on the part of the defendants. The arbitrator held that the words used were a term of art, and that such evidence was admissible, and accordingly received the same, and was satisfied thereby that the weekly accounts delivered by the plaintiff of such extra work were sufficient weekly accounts within the meaning of the contract, and, accordingly, included the value of such extra work in the amount awarded to the plaintiff.

With respect to the objection that the plaintiff was not entitled to recover for part of the extra work, on the ground that the same was not directed to be done by the architect by any writing under his hand pursuant to the contract, the arbitrator found and determined that, as regards the greater part of such extra work,

[\*10] the same was directed to be done by the architect by sufficient orders or directions in writing under his hand; but as regards a small part thereof, amounting to the sum of £105 18s. 5d., the only evidence of any such orders or directions in writing produced before him were certain sketches indicating the manner in which such extra work was to be done, but not specifying the materials to be used, or containing any absolute order or direction for the execution of such work. These sketches were all prepared in the office of the architect of the defendants by his clerks and under his directions, and were by his order furnished to the plaintiff, but were not signed by the architect or his clerks. As regards these sketches, the arbitrator held and adjudged that they were not sufficient orders or directions in writing within the meaning of the contract, and accordingly disallowed to the plaintiff the value of the work done under them.

The questions for the opinion of the Court were—First, was the arbitrator right in admitting parol testimony to show the meaning of the term "weekly accounts," as used in the contract?<sup>1</sup> If

<sup>1</sup> On the argument of the case, the arbitrator, being in court, explained that the question he intended to leave to the Court was, whether the contract was in its

terms such as would admit of parol evidence to show that it had been satisfied by the weekly accounts delivered.

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the Court should be of opinion that such evidence was inadmissible, then the amount awarded to the plaintiff was to be reduced by a certain sum.

Secondly, if the Court should be of opinion that the sketches were sufficient written orders or directions for the execution of the works therein indicated, and that no arbitrator ought to have allowed to the plaintiff the value of such works, then the amount awarded to the plaintiff was to be increased by the above sum of £105 18*s.* 5*d.*

A rule had been obtained by the defendants, calling on the plaintiff to show cause "why the case should not be remitted back to the arbitrator to be amended in the statement of facts, raising the first point," which rule was to be argued with the special case.

In the affidavits on which the rule was obtained, specimens of the weekly accounts delivered were attached, which were each headed "accounts of day work and materials," and it was sworn that it was conceded by the plaintiff before the arbitrator, that these accounts "contained an account of only a very small portion of the additions and alterations arising out of the contract, being confined to the day work expended in each week on such additions and alterations, and the materials used in such day work; that the defendants contended that accounts of all the work done ought to have been delivered, according to the unambiguous language of the contract; and the plaintiff then tendered evidence of architects and builders, to prove that the accounts delivered were sufficient, and that it was the custom, or common practice, in the building trade to deliver only accounts of such matters as the said accounts contained; and, in reference to extra works, capable of being measured, it was not usual to give any account of them," which evidence the arbitrator received, after objection by the defendants.

Bovill, for the plaintiff. — There is no real ground for the rule. The meaning of the question left by the arbitrator is quite sufficiently expressed in the case; viz., whether the contract admitted of being explained by the parol testimony. He was not bound to state more than what he, in his discretion, thought right, as he was to have power to state a case, but was not bound to state his award in the form of a case. Secondly, he was clearly right, according to all the decided cases, in admitting parol evidence to

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explain the meaning of "weekly accounts," if those words have a peculiar meaning in the building trade, which he has found that they have.

[BLACKBURN, J.—*Grant v. Maddox*, 15 M. & W. 737, 16 L. J. Ex. 227, is directly in point.]

Lush, *contra*.—That case is distinguishable. Parol evidence is admissible to show the meaning of peculiar words; but here is a whole sentence, which can admit of but one interpretation, that the plaintiff was to deliver weekly accounts of all the work done

"thereunder"—that is, under the orders of the architect.

[\*11] [BLACKBURN, J.—In *Grant v. Maddox*, the agreement was to employ the plaintiff for three years, and pay her so much a week in those years, and parol evidence was held admissible to show that "year" meant the theatrical year, or the portion of the year during which the theatre was open; so here, weekly accounts mean accounts of certain portions of the weekly work.]

"In the year" is a mere phrase; here is a whole sentence, specific and explicit.

[BLACKBURN, J.—ALDERSON, B.'s judgment, in *Grant v. Maddox*, is directly against the defendants. He says: "It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter, by parol evidence, the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to show what the contract is. Whenever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shown by parol evidence. Here the contract is, that the plaintiff is to be paid, for three years, a salary of £5, £6, and £7 per week in those years. That means, according to the evidence and the finding of the jury, that she is to be paid so much per week during every week that the theatre is open in those years." You seek to import the word "all" into this contract.]

It is clearly implied. This case comes directly within the authority of *Blackett v. The Royal Exchange Assurance Company*, 2 Cr. & J. 244, 1 L. J. (N. S.) Ex. 101, in which parol evidence of usage was held not admissible to show that, under a policy in general terms of the ship's boats, tackle, &c., a boat slung in a particular part of the ship was not included; and Lord LYNDHURST, C. B.,

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delivering the judgment of the Court, says: “The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boats and other furniture of the ship called the *Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the whole ship, on all her furniture, and on all her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped unless it had a boat in that place, and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That whereas the policy imported to be upon the ship, furniture and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.” In the same way, in the present case, the language used is plain, and must mean a weekly account of all the work done. “All” was not expressed in the policy in *Blackett v. The Royal Exchange Assurance Company*, any more than in the present contract. If the parties to it intended to restrain the weekly accounts to a particular part of the work done, they might easily have done it; and not having done so, they must be bound by the general and unambiguous terms which they have used.

[HILL, J.—That very argument was urged in vain by Mr. Peacock in *Grant v. Maddox*.]

In *Magee v. Atkinson*, 2 M. & W. 440, 6 L. J. (N. S.) Ex. 115, it was held that where a broker had contracted by brokers’ notes in his own name, parol evidence was held inadmissible to show it was the custom of Liverpool to send in brokers’ notes without the principal’s name.

[COCKBURN, Ch. J.—Two cases are noted in Park on Insurance (vol. i. p. 23, 8th ed.), *Ross v. Thwaite*, in which Lord MANSFIELD, Ch. J., was of opinion that evidence of usage was admissible to show that on a general policy on goods on board a particular

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ship, goods stowed on deck were not included; and *Backhouse v. Ripley*,<sup>\*</sup> in which CHAMBRE, J., ruled the same point.]

The principle of those cases is explained by Lord LYNDHURST, C. B., in *Bluckett v. The Royal Exchange Assurance Company*, viz., that an underwriter can only be liable, under a policy in general terms, for goods properly stowed, and is not liable for goods stowed negligently or in an improper place, unless he has expressly bound himself to such an extra risk by the terms of his policy. And those cases are therefore clearly distinguishable from the present.

[BLACKBURN, J.—In *Hatton v. Warren*, 1 M. & W. 466, 475, 5 L. J. (N. S.) Ex. 234, PARKE, B., in delivering the judgment of the Court, says, “It has long been settled, that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent.”]

Here, however, the contract is not silent; it says in unambiguous terms that weekly accounts shall be delivered every Monday of the work done under the orders for additions. In *Charlton v. Gibson*, 1 Car. & K. 541, CRESSWELL, J., refused parol evidence to explain in an agreement to win stone “for the purpose of building” certain cottages, in what sense “building” was used. That agreement was, at least, not more unequivocal than the present; on the second point it is clear that the sketches are not orders under the hand of the architect.

Tompson Chitty, in reply, on the first point, cited *Symons v. Lloyd*, 6 C. B. (N. S.) 691.

[COCKBURN, Ch. J.—We are agreed in favour of the plaintiff on the first point. The second point is too clear for argument; and though a very shabby defence to take judgment on, must be against the plaintiff if the defendants insist on setting it up.]

COCKBURN, Ch. J.—I am of opinion that the course pursued by the learned arbitrator in this case was perfectly proper and correct in point of law, and that this parol evidence was properly received. The duty of the Court, or of the arbitrator who is in the place of the Court, in construing a contract, is to give effect to the intention of the parties; and although parol evidence is not admissible to control the terms of a written contract, where the terms used in the contract clearly indicate the intention of the

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parties, and have in the trade in which the contract is drawn up no other than their ordinary acceptation and signification: yet if the parties have used terms which have not only an ordinary meaning, but also a peculiar meaning with reference to the particular department of trade or business to which the contract relates, that would obviously be not to take the real and true intention of the parties in the contract, if the meaning of the terms were to be interpreted according to their ordinary, and not according to their particular, signification in the trade or business in which the contract is made. Therefore it has always been held, ever since this question has come before the Courts, that where the terms in the particular contract have, besides their ordinary and popular sense, also a scientific or peculiar meaning, the parties who have drawn up the contract with reference to that particular department of trade or business must fairly be taken to have intended that the words should be used, not in their ordinary, but in their peculiar, sense. This is only acting upon the sound principle, that contracts are to be interpreted and carried out according to the intention of the parties; and it is only giving effect to that principle, when one gives to the words their peculiar, as distinguished from their popular, acceptation. This can only be carried out by means of parol evidence, to show what is the peculiar signification of the words in the contract, as distinguished from their ordinary sense. The matter is very well explained and elucidated by Mr. Starkie in his work on Evidence (vol. iii. p. 1033).<sup>1</sup> He says: “Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration” as [\*13] if the parties, in framing their contract, had made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of

<sup>1</sup> In the original edition of 1824; see vol. iii. p. 778 of third edition, of 1842; and p. 701 of last edition, of 1855.

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which usage and custom are the legitimate interpreters." I read that passage, not only because it has my entire approval, but because it has also had that of Lord WENSLEYDALE, when he sat as a Judge in this Court, and gave his opinion in the case of *Smith v. Wilson*, 3 B. & Ad. 733. Applying that principle here: the parties to this contract have used the term "weekly accounts of work;" parol evidence shows that "weekly accounts of work" has a peculiar signification in the building trade; that it relates, not to all the work done, but to a particular portion of work done, as to which weekly accounts, such as have been rendered here, are peculiarly necessary. It is said indeed by Mr. Lush, that because the terms are general, evidence of usage ceases to be admissible, and he cited the case of *Blackett v. The Royal Exchange Assurance Company*, in which Lord LYNDHURST, C. B., giving the opinion of the Court, held that a policy, covering boats in general terms, could not be controlled by evidence of usage that boats slung on the outside of the ship, upon the quarter, were excluded from the policy. I, of course, am bound by the authority of that case, as far as it goes; but I should not be disposed to carry it any further than to a case under exactly similar circumstances. It goes to the very extreme verge to which the exclusion of evidence, such as that tendered, could be taken. In the present instance, I do not think that that case need bind us. It is clear, upon the statement of the arbitrator, that in this particular trade the general terms used in a building contract as to a "weekly account of work done," is, by the general understanding of the trade not considered as extending to the whole of the work done. The terms are general; but I see no reason why usage may not be admitted to show that it is not all the work with regard to which general accounts are to be rendered, but only that portion of the work for which, by the understanding of the trade, weekly accounts are usually rendered.

The cases, *Ross v. Thwaite*, and *Backhouse v. Ripley*, 1 Park on Ins. 23, 8th ed., to which I drew the attention of Mr. Lush—the earlier cases upon the subject of goods stowed on deck not being covered by a policy which related to goods generally—appear to be immediately in point and applicable to this case. Those cases, which have ever since the time of the publication of Park on Insurance been found in the various text-books upon the subject of insurance, and have never been questioned, are to this

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effect—that where there is a policy on goods generally it may be shown by usage that goods not stowed in the ordinary manner, although in the vessel to which the policy relates, are not covered by the insurance. Yet there the terms are general, but by usage and by the evidence of usage they have received a limited and restricted signification. I see no reason, upon the authority of those cases, as well as upon the general principle, why a similar restriction should not be applied in the present case. It is true that the parties stipulated for a weekly account of the work done; but just as, in those cases, it was held that a policy on goods on board the vessel meant only goods stowed in a particular part of the vessel in the ordinary manner, so I think that here the general terms may be restrained and receive a limited signification by the general understanding of all persons in the trade to which the contract relates.

I am, therefore, of opinion that the evidence of usage was properly admitted by the learned arbitrator, and that there is no ground whatever for interfering with the award.

HILL, J.—I am entirely of the same opinion. The words in the contract are, “weekly accounts of the work done thereunder.” It is contended that the plain ordinary meaning of these words “would be “a weekly account of all the work done [<sup>\*14]</sup> thereunder.” The usage proved in the trade is, that such words used in a contract like this would be understood by the parties to mean merely “weekly accounts of the day work done thereunder;”<sup>1</sup> and the question is, whether that evidence was rightly received as evidence of usage. Now, I take the rule of law to be this: That words in a contract relating to the common transactions of life are to be construed according to their plain, ordinary, and popular meaning; but if, in reference to the subject-matter of the contract, particular words or expressions have by usage acquired a peculiar meaning different from their plain, ordinary, and popular meaning, parties using these words in such a contract must be taken to have used them in their peculiar sense, and evidence of usage fixing that sense is admissible to prove the meaning. That I take to be the rule of law; and it does not depend upon the point whether the expression is in itself ambiguous or unambiguous; it depends upon the fact whether, in refer-

<sup>1</sup> This did not appear on the case, but only from the affidavits.

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ence to the subject-matter of the contract, the word or expression has acquired a peculiar meaning.

BLACKBURN, J.—I am of the same opinion. The decision of this case turns simply upon the point,—that the words of a written contract are, as my Brother HILL has just said, to be understood in that sense which the phrase has acquired in the trade with regard to which it is used. It is the *prima facie* presumption that it was the intention of the parties to use it in that sense, and having expressed themselves in a written contract making use of the phrase, it is *prima facie*, as a matter of construction of the contract, to be taken that they used the phrase in the peculiar and limited sense which it had acquired in the trade. That peculiar and limited sense, if such an one has been acquired, must be shown by parol evidence; and this having been shown, then the presumption is, that that was the sense in which the parties making the contract used it. I do not think that, in order to introduce this extrinsic evidence, it is necessary that the phrase itself should be at all upon the face of it ambiguous. In the last case upon the subject, *Humphrey v. Dale*, 7 E. & B. 266, 26 L. J. Q. B. 137, where the question was as to the admissibility of parol evidence to annex to a contract a customary incident, which is nearly the same thing as what was done in the present case, I find Lord CAMPBELL, Ch. J., expresses the opinion of the Court in this way (7 E. & B. 274, 26 L. J. (N. S.) Q. B. 140): “Whether this [parol] evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument. And upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it.” There can be no doubt that that is quite true; that you do not need the evidence of custom unless it varies the contract, and makes it, so far, inconsistent with and different from that which it would be without the evidence of custom. But if you are to lay down a rule, that parol evidence of custom is to be excluded in every case where it is inconsistent with or varies

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from the contract, that will amount to saying at once, that parol evidence should never be received at all. But the true rule, as it seems to me, is very correctly laid down upon that point in Smith's Leading Cases, in the note to *Wigglesworth v. Dallison*, vol. i. p. 307, original ed., p. 462, 4th ed.; where, after setting out at length the judgment in *Hutton v. Warren*, 1 M. & W. 474, 5 L. J. (N. S.) Ex. 234, by Baron PARKE, the late Mr. Smith proceeds to say: “From the above luminous judgment of Baron PARKE, it may be collected that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which \*they are silent. . . . But [\*15] that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable; and this inconsistency may be evinced, first, by the express terms of the written instrument; secondly, by implication therefrom.” That, I take it, is the true rule of law upon the matter, that in each case of a contract, where it is shown that the term or phrase has acquired a peculiar meaning in the trade, it is, *prima facie*, to be taken as used with that meaning, unless, upon construing the whole contract, you can see that, either in express terms or by necessary implication, the parties intended to use it in a different sense. The consequence is, that in every individual case it must be a question on the construction of the contract, whether the evidence of custom is to be excluded or not. It is quite proverbial and familiar to every one to say, where the decision turns upon the construction of the particular contract, that every individual case must stand upon its own ground; and I think it will be found, that all the cases do recognise the principle,—that where the terms of the contract are such as to show that the parties intended to exclude the custom, they must be taken to have intended to use the phrase in a different sense; and then only the custom can be said to have been rejected. It will be found, I think, in each of the cases in which the evidence has been rejected; as, for instance, in *Blackett v. The Royal Exchange Assurance Company*, and in *Spartali v. Benecke*, 10 C. B. 212, 19 L. J. C. P. 293, that the Court thought, upon taking the language of the whole contract, it evinced, upon the face of it, an intention not to use the phrase or words in question in the particular sense sought to be put on them. Whether the

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conclusion drawn from the language of each particular contract was proper or not may be a different matter; but that principle is admitted throughout the cases. Now, in the present instance, there is nothing whatever upon the face of the contract to show that if the term "weekly account" had acquired a peculiar sense in the building trade, the parties intended not to use the term in the contract in that sense. The great probability is, that the builder and architect would intend to use it in that sense; but it is sufficient to say, that there is nothing on the face of the contract to show that the parties intended not to use it in that sense. Consequently, I think the learned arbitrator was quite right in admitting the evidence.

COCKBURN, Ch. J., added: With regard to the rule, that must be discharged, and we think it should be discharged with costs. It is plain when we come to look into the case, and it must have been especially plain to those who were cognisant of the discussion which took place before the learned arbitrator, that what he meant to ask the Court was, as he has himself told us, whether the evidence of the scientific use and signification of the term in question was controlled by the particular terms of this contract. I think that was quite sufficiently apparent without any application to the Court to send back the case to him to have it more clearly stated. Therefore the parties who have unnecessarily put the other side to expense must pay the costs.

*Rule discharged.*

*Judgment on the special case, for the plaintiff, on the first point; and for the defendants, on the second.*

#### ENGLISH NOTES.

Examples of the force of usage in interpreting mercantile instruments have already been given under No. 17 of "Agency," 2 R. C. 468; under No. 15 of "Contract," 6 R. C. 169, 170; under Nos. 7 and 8 of "Custom," 8 R. C. 356.

The judgment of the Court of Queen's Bench delivered by COLE-RIDGE, J., in *Brown v. Byrne* (1854), 3 El. & Bl. 703, 715, 23 L. J. Q. B. 313, 316, contains an important exposition of the principle as applied to mercantile contracts. The passage is as follows: "In all contracts, as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of these usages: they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included,

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however, as of course, by mutual understanding ; evidence, therefore, of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But in these cases a restriction is established, on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded, because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than ‘a thousand,’ ‘a week,’ ‘a day’? Yet the cases are familiar in which a ‘thousand’ has been held to mean twelve hundred (*Smith v. Wilson*, 3 B. & Ad. 728); ‘a week,’ a week only during the theatrical season (*Grant v. Maddox*, 15 M. & W. 737); ‘a day,’ a working day. In such cases, the evidence neither adds to, nor qualifies, nor contradicts the written contract—it only ascertains it by expounding the language. Here, the contract is to pay freight on delivery at a certain rate per pound; is it inconsistent with this to allege, that by the custom the shipowner, on payment, is bound to allow three months’ discount ? We think not.”

Other examples are “‘mines and minerals’ excepted in an agricultural lease construed as not including surface flints : *Tucker v. Linger* (H. L. 1883), 8 App. Cas. 508, 52 L. J. Ch. 941, 49 L. T. 373, 32 W. R. 40 ; “level,” as construed in a mining lease : *Clayton v. Gregson* (1836), 5 Ad. & El. 302 ; “18 pockets Kent hops at 100s.” to mean 18 pockets at 100s. per cwt.: *Spicer v. Cooper* (1841), 1 Q. B. 424, 1 G. & D. 52, 5 Jur. 1036.

In *Lewis v. Marshall* (1844), 7 M. & G. 729, 13 L. J. C. P. 192, where a shipbroker guaranteed a full cargo for a ship to Sydney, at rates of freight to average 40s. per ton, and at least nine cabin-passengers, an attempt was made to show a usage of the trade to Sydney “to consider steerage-passengers as cargo and their passage-money as freight ;” but the Court held it was not enough for witnesses to state a usage generally in these terms, without stating any instance in their own knowledge of such a use of the terms in a contract which itself was admittedly an unusual one. In delivering the judgment of the Court, TINDAL, Ch. J., said: “The question was, whether there was a recognised practice and usage with reference to the trade and business out of which the written contract, the subject-matter of the action, arises, and to

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which it related, which gave a particular sense to the words employed, or so that the parties might be supposed to have used those words in such a sense. The character and description of the evidence admissible for that purpose is the fact of a general usage and practice prevailing in a particular trade or province, and not the judgment and opinion of the witnesses. For the contract may be safely and correctly interpreted by reference to the fact of such usage, as it may be presumed that such fact is known to the contracting parties, and that they contracted in conformity thereto; but the judgment and opinion of witnesses can afford no safe guide, for their judgment and opinion is confined to their own knowledge. And upon referring to the notes of the evidence on the trial, we are inclined to think the evidence offered fell under the latter character and description, and upon that general ground was properly withdrawn by the Judge from the consideration of the jury." The judgment proceeded to show that if the evidence had been submitted to the jury they ought to have disregarded the alleged custom, — for "cargo" and "freight" in their natural and ordinary meaning refer to goods only. And especially as the terms "passengers" and "passage-money" had been used in the contract, as distinct from "cargo" and "freight," the evidence to vary the plain meaning ought to have been clear, cogent, and irresistible.

## AMERICAN NOTES.

This case is cited in Browne on Parol Evidence, p. 203, to the following proposition: "Extrinsic evidence is admissible in the construction of a mercantile contract, to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by the usage of trade, a peculiar signification, not attaching to them in their ordinary use, and this whether the phrases or terms are apparently ambiguous or not." In *Walls v. Bailey*, 49 New York, 464, FOLGER, J., said: "The meaning of words may be controlled and varied by usage, even when they are words of number, length, or space, usually the most definite in language." So in *Hinton v. Locke*, 5 Hill, 437, BRONSON, J., said: "Usage can never be set up in contravention of the contract: but when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract with reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. The evidence often serves to explain or give the true meaning of some word or phrase of doubtful import, or which may be understood in more than one sense, according to the subject-matter to which it is applied." See *Williams v. Woods*, 16 Maryland, 220. "Words are but the vehicle of thought, and if by the usage and practice of one class of the community words are used in a different sense from their acceptation among others, not engaged in the same pursuit, it would be the height of injustice to interpret their language by a rule not within their con-

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temptation at the time of making the contract." "The rule may be regarded as well settled that the meaning of characters, marks, letters, figures, words, or phrases used in contracts, having purely a local or technical meaning, unintelligible to persons unacquainted with the business, may be given and explained by parol evidence, if the explanation is consistent with the terms of the contract. So also parol evidence may be given as to the uniform, continuous, and well-settled usage and custom pertaining to the matters embraced in the contract, unless such usage and custom contravene a rule of law, or alter or contradict the express or implied terms of the contract, free from ambiguity."

Usage has been allowed to be proved in the following typical cases among a vast number: To show that among insurers "furs" does not include skins and hides: *Astor v. Union Ins. Co.*, 7 Cowen (N. Y.), 202; and that sarsaparilla is not a "root": *Coit v. Com. Ins. Co.*, 7 Johnson (N. Y.), 385; 5 Am. Dec. 282; whether "cargo" would cover live-stock: *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & Johnson (Maryland), 136; 20 Am. Dec. 424; whether "tanning" includes currying: *Barger v. Caldwell*, 2 Dana (Kentucky), 129; *Sunyson v. Gazzam*, 15 Alabama, 123; 30 Am. Dec. 578; that ten hours constitute a "day's work": *Hinton v. Locke*, 5 Hill (N. Y.), 437; that tulip trees "one foot high" meant to the top of the ripe wood, rejecting the green, immature top: *Barton v. McKelway*, 22 New Jersey Law, 165; that "the trade of a cabinet and mahogany door maker" meant only the making of doors of mahogany and other ornamental woods: *Stroud v. Frith*, 11 Barbour (N. Y.), 200; that "barrel" meant only a vessel of a certain capacity, and not a statutory barrel: *Miller v. Stevens*, 100 Massachusetts, 518; 1 Am. Rep. 139; that two packs of shingles were regarded as 1000: *Soutier v. Kellerman*, 18 Missouri, 509. To reject fractions of a foot in measurement: *Merrick v. McNally*, 26 Michigan, 374. To show mode of "estimation" of quantity of logs: *Heald v. Cooper*, 8 Maine, 32. Where moisture was to be deducted "as usual" from weight of ore, to show whether the deduction was to be made before or after weighing: *Humphreysville Copper Co. v. Vermont Copper Mining Co.*, 33 Vermont, 92. To show that "the thousand feet" of lumber meant linear feet: *Brown v. Brooks*, 25 Penn. State, 210. That the number of bricks laid in a pavement might be computed by allowing a certain number to the square yard: *Pittsburgh v. O'Neill*, 1 Penn. State, 342. To measure walls in a certain way: *Ford v. Tirrell*, 9 Gray (Mass.), 401; *Lowe v. Lehman*, 15 Ohio State, 179; *Walls v. Bailey*, 49 New York, 464; 10 Am. Rep. 407 (charging for plastering without deduction for cornices, baseboards, doors, or windows). To ascertain the point of beginning in measuring for "a 9-foot ceiling:" *Hugg v. Shank*, 1 Silvernail (N. Y. Sup. Ct.), 153; *Johnson v. De Peyster*, 50 New York, 666. To show that "rags and old metals," on insurance of junk-dealer's stock, include, the first, all articles used in manufacturing paper, and the second, old india-rubber and old glass. *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277. That "his crop" included what the seller bought and controlled as well as what he raised and cut: *Goodrich v. Stevens*, 5 Lansing (N. Y. Sup. Ct.), 230. That "products" in the pork business does not include certain parts of the hogs:

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*Morningstar v. Cunningham*, 110 Indiana, 328; 59 Am. Rep. 211. That “glass-ware in casks,” in insurance, means only in open casks: *Bend v. Georgia Ins. Co.*, 1 N. Y. Leg. Observer, 12. To show what articles are “usually kept in country stores,” in insurance: *Pindar v. Kings County Ins. Co.*, 36 New York, 618. That “harbor of New York,” in insurance, includes Tarrytown, thirty miles up the Hudson River: *Petrie v. Phoenix Ins. Co.*, 132 New York, 137. That “room” included a loft not divided into rooms: *Daniels v. Hudson R. F. Ins. Co.*, 12 Cushing (Mass.), 416. That “gas fixtures” does not include meters: *Downs v. Sprague*, 1 Abbott Ct. App. Dec. (N. Y.), 550. That “spoiled lumber” means unmarketable: *Harris v. Rathbun*, 2 Keyes (N. Y. Ct. App.), 312. That “a frame house filled in with brick” includes one supported on the sides by walls of other houses: *Fowler v. Aetna Ins. Co.*, 7 Wendell (N. Y.), 270. That a “car-load” of hogs includes a double-decked car-load: *Hanley v. Canadian Packing Co.*, 71 Ontario App. 119. That “faney goods and Yankee notion store” includes fire-works and fire-crackers: *Barnum v. Merch. F. Ins. Co.*, 97 New York, 188. That a “whaling voyage” covers the taking of sea-elephants: *Child v. Sun Mut. Ins. Co.*, 3 Sandford (N. Y. Super. Ct.), 26. Whether “all materials and labor for plumbing” included kitchen ranges: *Cassidy v. Fontham*, 38 New York St. Rep'r, 177. To show that “outstanding accounts” meant only collectible accounts: *McCulsky v. Klosterman*, 20 Oregon, 108. That “screened coal” does not include nut coal: *Mercer, &c. Co. v. McKee's Adm'r*, 77 Penn. State, 170. That “First Nat. LaFayette, Ind.” means a bank: *Lane v. Union Nat. Bank*, 3 Indiana Appeals, 299. That “equipment” of a mining company may include mules: *Rubey v. Coal & M. Co.*, 21 Missouri Appeals, 159.

Usage has also been allowed to define the following words and phrases: “Freight”: *Peisch v. Dickson*, 1 Mason (U. S. Cir. Ct.), 11. “Wholesale factory price”: *Avery v. Stewart*, 2 Connecticut, 69; 7 Am. Dec. 240. “Sea letter”: *Sleight v. Rhinelander*, 2 Johnson (N. Y.), 192. “Inevitable dangers of the river”: *Gordon v. Little*, 8 Sergeant & Rawle (Penn.), 553. “C. O. D.”: *Collender v. Dinsmore*, 55 New York, 200; 14 Am. Rep. 224. “On margin,” in a stock contract: *Hatch v. Douglas*, 48 Connecticut, 116; 40 Am. Rep. 154. “Port risk”: *Nelson v. Sun M. Ins. Co.*, 71 New York, 453. “Current funds”: *Galena Ins. Co. v. Kupfer*, 28 Illinois, 332; 81 Am. Dec. 284. “British weight”: *Goddard v. Bulow*, 1 Nott & McCord (So. Car.), 45; 9 Am. Dec. 663. “Spitting of blood”: *Singleton v. St. Louis Ins. Co.*, 66 Missouri, 63; 27 Am. Rep. 321. “Cuts”: *Houghton v. Ins. Co.*, 131 Massachusetts, 300. “Keeping a watch”: *Crocker v. People's M. F. Ins. Co.*, 8 Cushing (Mass.), 79. “Fire by lightning”: *Babcock v. Mont. Co. M. F. Ins. Co.*, 6 Barbour (N. Y. Sup. Ct.), 637; 4 New York, 326. “Six per cent off for cash”: *Linsley v. Lovely*, 26 Vermont, 123; “Milk route”: *Page v. Cole*, 120 Massachusetts, 37. “Merchantable shipping hay”: *Fitch v. Carpenter*, 43 Barbour (N. Y. Sup. Ct.), 40. “Season”: *Myers v. Walker*, 24 Illinois, 133. “Product”: *Stewart v. Smith*, 28 Illinois, 397; *Waechterhauser v. Smith*, 31 New York St. Rep'r, 552. “Prices guaranteed”: *Coulter M. Co. v. Fort Dodge G. Co. (Iowa)*, 66 N. W. Rep. 875. “Order,” in book-canvassing: *Newhall v. Appleton*, 114 New York, 140. “To be taken by January 1st, 1883, on dock in New York”: *Atkinson v. Truesdell*, 127

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New York, 230. “On approval”: *Smith v. Clews*, 114 New York, 190; 11 Am. St. Rep. 627.

On the other hand, parol evidence of this character has been refused in the following instances: On a contract to make a “satisfactory” suit of clothes, to show a custom to try on and alter. *Brown v. Foster*, 113 Massachusetts, 136; 18 Am. Rep. 463. To show that “to arrive by” a certain date meant “deliverable by.” *Rogers v. Woodruff*, 23 Ohio State, 622; 13 Am. Rep. 276. To explain “settlement.” *Susquehanna F. Co. v. White*, 66 Maryland, 444; 59 Am. Rep. 186. “Incompatible” in a contract of employment. *Gray v. Shepard*, 147 New York, 177. To show that “alongside” a ship means on the earth at the head of the wharf. *Turnbull v. Citizens’ Bank*, 4 Woods (U. S. Circ. Ct.), 192. To show that “free on board” meant subject to inspection. *Silberman v. Clark*, 96 New York, 522. To explain “to be delivered by giving ten days’ notice at any time in June.” *Wilmerling v. McGaughey*, 30 Iowa, 205; 6 Am. Rep. 673. To show that “more or less” covered a variation of not more than five per cent. *Vail v. Rice*, 5 New York, 155. To explain “fat, smooth, and merchantable steers, three and four years old, to average twelve hundred pounds gross weight, none to weigh less than one thousand pounds.” *Spears v. Ward*, 48 Indiana, 541. “Clear out the field.” *Harper v. Pound*, 10 Indiana, 32. “Subject to storage.” *Marks v. Cass Co., &c. Co.*, 43 Iowa, 146. To show that a contract to leave a mine “in good working order” justifies removal of supports and pillars of coal. *Randolph v. Halden*, 44 Iowa, 327. “Good order.” *Polhemus v. Heiman*, 50 California, 438. “Epidemics.” *Pohalski v. Mut. L. Ins. Co.*, 36 N. Y. Super. Ct. 234; 56 New York, 640. “Coppered ship.” *Hazard’s Adm’r v. N. E. Mut. Ins. Co.*, 8 Peters (U. S. Sup. Ct.), 557. To show that “standing detached” meant at least ten feet distant. *Hill v. Hibernia Ins. Co.*, 10 Hun (N. Y. Sup. Ct.), 26. To ascertain the quantity of “brick in the wall” by measurement rather than by count. *Sweeney v. Thomason*, 9 Lea (Tennessee), 359; 42 Am. Rep. 676. Where a hirer of a slave was “to lose the negro’s lost time,” to show that this did not include time lost by death. *Barlow v. Lambert*, 28 Alabama, 704. To show that “earth” does not include “hard pan.” *Dickinson v. City of Poughkeepsie*, 75 New York, 65. “Made useful,” in respect to artificial teeth. *Davis v. Ball*, 6 Cushing (Mass.), 505; 53 Am. Dec. 53. To show that whitewood would answer for “walnut” counters. *Greenstine v. Borchard*, 50 Michigan, 434; 45 Am. Rep. 51. On a contract to pay for plastering by the yard, to include one-half the window space. *Jordan v. Meredith*, 3 Yeates (Penn.), 318.

The exclusion of evidence of custom or usage in this regard is well explained in *Pohalski v. Mut. Life Ins. Co.*, *supra*, as follows: “It is true that the rule” (the parol evidence rule) “referred to is directed only against the admission of any other evidence of the *language* employed by the parties in making the agreement than that which is furnished by the writing itself, and that the writing may be read by the light of the surrounding circumstances. But this is permitted only for the purpose of finding out the true sense of the written words as the parties used them. . . . Unless, therefore, the terms of the written instrument have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense

**No. 4.—Roberts v. Brett, 34 L. J. C. P. 241.—Rule.**

of the same words, or unless the context points out that in the particular instance, and in order to effectuate the intention of the parties, they should be understood in a peculiar sense, they are to be understood in their plain, ordinary, and popular sense. . . . The word ‘epidemics’ in the permit is not shown to have been used in the peculiarly medical sense attributed to it by the learned counsel for the company, nor was it used in a sense peculiar to the business of life insurance. On the contrary, it is plainly to be seen that it was used and understood in its plain, ordinary, and popular sense as a familiar word in our language. No evidence of any kind from any other source was therefore admissible to charge that meaning. . . . The company evidently did not intend to stipulate solely against diseases which usually assume an epidemic character. It meant to stipulate, and did stipulate, for exemption from liability in case of death from *any* disease, however simple and harmless, under ordinary circumstances, at home, that might by any possibility prevail in Cuba to an extent that might be called epidemic.”

**No. 4.—ROBERTS *v.* BRETT.**

(H. L. 1865.)

**RULE.**

WHETHER the doing of an act by the obligee under an instrument is a condition precedent of the obligation depends not on any hard and fast rule as to the time when the act is to be done, but on the intention of the parties to be deduced from the whole instrument.

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34 L. J. C. P. 241–248 (s. c. 11 H. L. Cas. 337).

[241] *Contract.—Condition Precedent.—Mutual Covenants.—“Forthwith,” Meaning of.*

By indenture of the 15th of May, the plaintiff covenanted with the defendant to procure a ship to stow on board a certain telegraphic cable then lying at M. Wharf, to provision and rig the vessel, to provide and pay the crew and workmen, &c., to lay down the cable, and that he, the plaintiff, would perform the several acts aforesaid and have the ship ready equipped for sea at the Nore on or before the 15th of July, and would proceed forthwith to T. and lay down the cable: and if the plaintiff made default in having the ship ready with the cable on board at the Nore by the 15th of July, the defendant might deduct and retain as liquidated damages £200 a week. The defendant covenanted, subject to his right to deduct and retain as liquidated damages, to pay the plaintiff £5000, by instalments, that is to say, £1000, part thereof, on or before the expiration of seven days after the arrival of the ship at M. Wharf; £2000, further part, on or before twenty-one days after the arrival of the ship at the wharf; the remain-

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der when the ship should put to sea from the Nore. And it was by the same indenture agreed and declared, that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing the penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days of the execution of these presents, give and execute to the defendant, his executors and administrators, a bond in the penal sum of £5000; and for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of £5000.

It was held, by the Court of Exchequer Chamber, that the giving of the bond with sureties by the plaintiff to the defendant was a condition precedent to his right to recover against the defendant for not performing his part of the contract with relation to stowing the cable and paying the money; and this decision was affirmed by the House of Lords on appeal, and it was also held that the plaintiff was not released from his obligation to give a bond by reason of the defendant not having given a bond.

“Forthwith” held not to mean “immediately.”

This was an action brought by the plaintiff, the appellant, a captain in Her Majesty’s Royal Marine Artillery, against the defendant, the respondent, the *gérant* in this country of a joint-stock company established in France, called the Mediterranean Submarine Electric Telegraph Company, to recover damages for a breach of an agreement under seal entered into between the plaintiff and the defendant on the 15th of May, 1855, for the laying down by the plaintiff of one hundred and fifty miles of submarine telegraph cable, called in the agreement “The African and Sardinian Cable,” and which cable the plaintiff undertook to lay down between Cape Tabaque, on the northern coast of Africa, and Cape Spartivento, in the island of Sardinia. The agreement, or so much thereof as is material to the present proceedings, is set out in the declaration in the action, which will be found in the report of the case in the Court of Common Pleas (25 L. J. C. P. 280), but was shortly as follows:—

By the agreement the plaintiff was bound forthwith, at his own expense, to procure a frigate called the *Cornwall*, or some other suitable ship or vessel, and to stow the cable on board, and which cable was in the agreement expressly stated to be then lying at Morden’s Wharf, East Greenwich; the plaintiff was also bound, at his own expense, to rig, complete, fit out, provide and provision the said ship, with all things necessary, as set forth in the agreement, and to pay £600 towards insuring the cable for £60,000.

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The agreement then stated that the plaintiff was to have the ship ready for sea at the Nore on the 15th of July, then next; and in the event of the plaintiff failing to have the ship fully equipped at the Nore on or before that day, the defendant was to be at [\* 242] liberty to retain out of any moneys payable to the plaintiff under the agreement £200 a week as liquidated damages for every week, and so in proportion for less than a week of such default. The defendant covenanted to pay to the plaintiff the sum of £5000, as follows: £1000 on or before the expiration of seven days after the arrival of the ship at Morden's Wharf; the sum of £2000, further part thereof, on or before the expiration of twenty-one days after the ship should have arrived alongside Morden's Wharf; and the sum of £2000, the remainder of the said sum of £5000, as soon as the said ship should have proceeded to sea from the Nore; and besides these money payments the plaintiff was to have five hundred £10 paid-up shares in the said company delivered to him.

By the agreement it was also agreed and declared, that for the true performance of the covenants by the plaintiff, and for securing any penalties which he might incur, the plaintiff and two responsible sureties should, within ten days after the execution of the agreement, give and execute to the defendant a bond in the penal sum of £5000; and that for the due performance of the covenants on the part of the defendant, the defendant and two sureties should, within ten days from the execution of the agreement, give and execute to the plaintiff a bond in the penal sum of £5000; and that the said bonds so to be given should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff or of the defendant under or by virtue of the agreement.

The plaintiff, in his declaration, after setting out the agreement and averring performance of all conditions precedent, alleged as breaches of the agreement, that before the time arrived for the plaintiff to bring his ship alongside Morden's Wharf for the purpose of taking the cable on board, the defendant refused to perform his contract, and dispensed with the said ship being brought alongside the said wharf, and would not stow the cable on board the ship, but caused the same to be stowed on board another ship, and thereby prevented the plaintiff from completing the said contract on his part. There was also a further breach assigned, that the defendant did not, in pursuance of the covenant on his behalf in

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the said agreement contained, give a bond with sureties to the plaintiff in the penal sum of £5000.

The defendant pleaded—

1. That the plaintiff did not procure a suitable ship.
2. That the plaintiff did not rig, complete, fit out, and provision her.
3. That the plaintiff was not ready and willing to provide and pay officers, and crew, and workmen.
4. That the plaintiff did not give a bond with two sureties to the defendant in the penal sum of £5000.
5. And, in answer to the breach respecting the defendant not giving his bond to the plaintiff, the defendant paid into Court the sum of 1s.

Upon the first three and fifth pleas issues in fact were raised, and to the fourth there was a demurrer: the question raised by the demurrer being, whether or not the performance by the plaintiff of the covenants on his part set out in the declaration, "That for the true performance of the covenants by the plaintiff herein-before mentioned, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days from the execution of these presents, give and execute to the defendant a bond in the penal sum of £5000," was a condition precedent to the obligation of the defendant to perform those covenants on his part, to the breach of which the fourth plea was pleaded.

The demurrer came on to be argued in the Court of Common Pleas, on the 10th of June, 1856, when the Court gave judgment for the defendant.

The report of the case upon this demurrer is to be found in 18 C. B. 561, and in 25 L. J. C. P. 280.

On the 28th of June, 1858, the issues in fact came on for trial before the Chief Justice of the Court of Common Pleas and a special jury. The jury found that the plaintiff did procure a suitable ship, properly equipped, according to the contract, and was ready to provide the officers and crew, and found all the issues in fact in favour of the plaintiff, and they assessed the damages which the plaintiff had sustained at £2300.

The plaintiff having obtained this verdict <sup>\*</sup> for the [243] £2300, and which verdict was not disturbed, then appealed to the Court of Exchequer Chamber against the decision of the

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Court of Common Pleas on the demurrer, when the judgment of the Court of Common Pleas was unanimously affirmed.

The report of the proceedings in the Exchequer Chamber is to be found in 6 C. B. (N. S.) 611, and in 28 L. J. C. P. 323.

It will be seen by reference to these reports of the case, that after the argument on the demurrer in the Court of Common Pleas there was a slight amendment in the original declaration, but which was not of importance to the present question. The plea demurred to was not amended in any way, and the pleadings went before the Exchequer Chamber as set out in the report of the proceedings in the Exchequer Chamber.

This was an appeal to the House of Lords against the judgment of the Court of Exchequer Chamber upon the fourth plea.

Bovill and Massey Dawson (Beasley with them), for the appellant. — It was never intended that the giving of the bonds should be a condition precedent to the contract being binding on either party. Where parties stipulate to have bonds as a condition precedent, they would wait till the bonds were given, and they were satisfied with the sureties before signing the contract, which was not done in this case. The contract also is, that the appellant is forthwith to do certain things, that is, before the expiration of the ten days within which the bonds are to be given. There is nothing in the contract to show that anything was not to be done till after the bonds were given. The appellant might have brought the ship alongside the wharf, or offered to take the cable on board at any hour after the signing of the contract, and the respondent would have been bound within seven days to pay the £1000, the first instalment of the £5000. If there is a thing that is to be done, or may have to be done before the act which is relied upon as a condition precedent is to be performed, then it cannot be a condition precedent. *Pordage v. Cole*, 1 Wms. Saund. 320 c, n. 3. The intention of the parties must be looked at to see whether they intended that the thing should be a condition precedent or not. It would lead to the most absurd consequences to hold this to be a condition precedent. The question is whether the fourth plea is a good plea. It is not, for the respondent should have requested the bond from the appellant, and must show that he was ready to do the concurrent act on his part, which this plea does not allege. Where there are several stipulations in a contract, some of which have been performed and some of which have

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not been performed, the non-performance of those that remain will not afford an answer to a breach of contract by the other party. *Stavers v. Curling*, 3 Bing. N. S. 355, 6 L. J. (N. S.) C. P. 41; *Boone v. Eyre*, 1 H. Blac. 273, n. (2 R. R. 768). The not giving of the bond in the present case may be compensated in damages. The consequence of holding the giving of the bond to be a condition precedent in this case would lead to the greatest injustice. The appellant having established a claim for £2300 before a jury, would be unable to obtain it on account of this plea. The matter omitted to be done was not the consideration for what was to be performed on the other side. The giving of the bonds was an independent stipulation. The matter which has not been performed must go to the whole consideration. *Tarrabochia v. Hickie*, 1 Hurl. & N. 183, 26 L. J. Ex. 26; *Kingdon v. Coe*, 2 C. B. 661, 15 L. J. C. P. 95; *Clipsham v. Vertue*, 5 Q. B. 265, 13 L. J. Q. B. 2. Where a time is fixed for performance, as in the present case, the procuring of the ship by the appellant, the money must be paid, whether the other stipulations, as the giving of the bond in the present case, have or have not been complied with, and on the ground that there may be a remedy by cross-action. *Campbell v. Jones*, 6 T. R. 570 (5 R. R. 263); *Mattock v. Kinglake*, 10 Ad. & E. 50, 8 L. J. (N. S.) Q. B. 250; *Dicker v. Jackson*, 6 C. B. 103, 17 L. J. C. P. 234. The appellant alleges that there was a positive breach by the respondent before the time arrived when the \* bond was to be given, from which [\* 244] the respondent must absolve himself. *Hochster v. Delatour*, 2 El. & B. 678, 22 L. J. Q. B. 455; *Lovelock v. Franklin*, 8 Q. B. 371, 15 L. J. Q. B. 146; *Cort v. The Ambergate Railway Company*, 17 Q. B. 127, 20 L. J. Q. B. 460. *Ellen v. Topp*, 6 Ex. 424, 20 L. J. Ex. 241, and *Graves v. Legg*, 6 Ex. 709, 23 L. J. Ex. 229, relied on by the respondent in the Court below, are distinguishable from the present case. There is a contract entered into at once without the bonds being given; there has been a part performance, and the giving of the bonds is not a condition precedent. We also rely upon the stipulation that the giving of the bonds was not to prejudice the rights and liabilities of the parties. The declaration is a good declaration, and the plea is a bad plea. They also referred to *Helm v. Burness*, 8 Law Times (N. S.), 207; *Short v. Stone*, 8 Q. B. 358, 15 L. J. Q. B. 143; and 2 Smith's Lead. Cas. 11, notes.

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Mellish and H. Lloyd, for the respondent. — It was a condition precedent to the respondent's liability to stow the cable on board the ship provided by the appellant that the appellant should have given his bond. This is a question of construction, and the instrument is to be construed for the purpose of carrying out the intention of the parties. The cases cited on the other side show this. The giving of the bond in the present case was intended to be a condition precedent; if it is not a condition precedent, and the only remedy is in damages, the intention is frustrated. The word "forthwith" is a general and vague word, and only means that it is to be done with reasonable despatch and in a reasonable time. It does not follow, because the giving of the bond is a condition precedent at one time, that it would remain so if the cable had once been loaded on board: *Boone v. Eyre*; but that is not the case here. Here, both parties having failed to give the bond, either party is at liberty to rescind the contract, because that is carrying out the object of the contract. They might mutually have agreed to go on with the contract, notwithstanding the failure to give the bond; but they did not do so. The declaration contains no averment that the appellant was ready and willing to give the bond, and that the respondent before the expiration of ten days refused to perform the contract and dispensed with the bond. If the declaration had contained such an averment, a plea alleging that the appellant had not given the bond would have been bad; but the declaration contains no such averment. The declaration simply alleges that the appellant has performed all the conditions precedent, and amongst others he has given the bond, and this is traversed. The cases cited by the other side are totally different from the present. The true construction of the clauses here is, that the respondent cannot be called on to carry out his part of the agreement, unless the appellant has within ten days given his bond. There was no necessity for a demand of it. Upon the question of pleading, upon the true construction of the declaration, the appellant alleges that he performed all the conditions precedent, therefore that he gave the bond. The plea is a good plea: it says that he did not give the bond. By demurring to that plea and not traversing it, the appellant admits that if the giving of the bond is a condition precedent, he did not comply with that condition. In *Hochster v. Delatour* it is true there is not the allegation which in order to make the declaration complete there

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ought to be, but the question there arose on a motion in arrest of judgment, and it is a well-known distinction between a question so arising and one arising on a demurrer that every fair inference is to be taken for the plaintiff when the question so arises, and that small imperfections in his declaration will be looked over. But for that, there ought to have been an averment there that the plaintiff accepted the refusal as an absolute breach, and acted upon it. *Avery v. Bowden*, 6 El. & B. 953, 26 L. J. Q. B. 3.

Massey Dawson, in reply, cited *Bently v. Dawes*, 10 Ex. 734, 23 L. J. Ex. 220, with regard to the effect of the general averment.

\*The LORD CHANCELLOR (Lord WESTBURY).—My Lords, [\* 245] the question on this appeal is, whether, having regard to the true construction and intent of the agreement of the 15th of May, 1855, the stipulation that the appellant should, within ten days after the date and execution of the agreement, give a bond, with sureties, for the due performance of the covenants on his part, is a condition the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement. The case has been learnedly argued at the Bar, and many decisions were cited; but the question depends on simple principles. First, having regard to the subject-matter of the agreement between the appellant and the respondent, who was the representative of a company, it is reasonable to suppose that the company, who were about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract; and the requisition that the bond should be given within ten days is sufficient to show that it was intended to precede any material action under the agreement. The appellant indeed contends, that if he had brought the *Corunna* frigate, or some other suitable vessel, alongside Morden's Wharf on the day of the date of the agreement, or the next day, the sum of £1000 would have been payable to him by the respondent within a week afterwards; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond, and that therefore the giving of the bond is not a condition precedent. I cannot think that any such great expedition, if it was possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engage-

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ment is, that he will forthwith at his own expense procure the *Cornwall* frigate, or some other suitable ship or vessel, for the purpose required; the word "forthwith" does not necessarily imply that this was to be done by the appellant before he had received the bond of the respondent and his sureties, that is, before the expiration of ten days. But if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of £1000, and had received that sum (which must be the hypothesis) within the ten days, and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time. It is urged that in the state of things supposed the £1000 might not have been paid as stipulated, and so a breach of covenant by the respondent might have occurred within the ten days. If it did, I should still be of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant was a very material thing to the respondent's company and of the essence of the contract, and I do not think it could be affected by anything voluntarily done by the appellant within the ten days.

It was also contended, by the appellant, that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent one on the other; and that there was no default by the appellant until that instant of time at which there was a like default by the respondent, and that the respondent, being in like default, could not defend himself by pleading the default of the appellant. But I fear that this is not the true meaning and effect of the contract. The engagements to give the bond are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement that each party should find security within the time prescribed. If this be not done by either party, both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the covenants in the agreement unless he has performed this precedent obligation. I therefore move your Lordships that the judgment of the Court below be affirmed.

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Lord CRANWORTH. — My Lords, I think that the judgment of the House ought to be for the defendant in error. I agree with the opinions of the learned Judges that the giving of the bond must have been intended \* to be a condition precedent [\* 246] to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless. No doubt, as there was a covenant by each party with the other, to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant; but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants, it could only result in nominal damages. If brought after a breach, no damages could be recovered, except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond. It was argued that the circumstance that the bonds were to be given not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might occur within the ten days, and so a right of action might accrue, before any bond need have been given. This does not appear to me inconsistent with the hypothesis of a condition precedent. Probably the parties knew that, practically, no breach could occur within the ten days; but even if that is not so, the party injured by a breach of covenant within ten days might, by giving his bond, put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the defendant sued for the breach to say, that he had not given his bond. Suppose, for instance, that the plaintiff had on the day of the date of the indenture moored a proper ship alongside Monden's Wharf, but that after the expiration of seven days the defendant refused to pay him the £1000. The plaintiff, if he had given a proper bond with sureties to the defendant, would then have been in a condition to maintain an action for breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff.

But it was argued, that even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the defendant, who had given no bond to the plaintiff, could not insist on the want of such a

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bond from him. I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the Courts below, and in that view of the case I concur.

Lord CHELMSFORD. — My Lords, I agree with the decision in the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas.

The question is, whether the fourth plea is an answer to the action; or, in other words, whether the giving the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement.

The only parts of the deed necessary to be noticed are, first, the covenants of the plaintiff, that he would forthwith, at his own expense, procure the *Cornwall* frigate, or some other suitable ship or vessel, and should and would stow or cause to be stowed on board the said ship or vessel the submarine telegraphic cable, which was one hundred and fifty miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, and should do various acts in fitting out and provisioning the ship or vessel, and providing sufficient officers and crew, and should and would do and perform all the several acts thereafter covenanted to be performed by him the plaintiff, and have the said ship fully equipped in all respects, and ready for sea, at the Nore, on or before the 15th of July then next; secondly, the covenants of the defendant to pay the plaintiff £5000 by the instalments and at the times thereafter mentioned, that is to say, the sum of £1000 on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, and the sum of £2000 on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and

[\* 247] the sum of £2000, the remainder thereof, when and so

and, lastly, the stipulation for mutual bonds, in these terms: "And it is hereby agreed and declared, that for the true performance of the covenants by the plaintiff hereinbefore con-

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tained, and for securing any penalties which he may incur under these presents, the plaintiff and two responsible sureties shall, within ten days from the execution of these presents, give and execute to the defendant a bond in the penal sum of £5000; and for the due performance of the covenants on the part of the defendant hereinbefore contained, the defendant and two responsible sureties shall, within ten days from the execution of these presents, give and execute to the plaintiff a bond in the penal sum of £5000."

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond could not be intended to be a condition precedent, because he was forthwith bound to procure the ship or vessel; so that he was to do an act before the ten days had expired within which the bond was to be given; and also that the defendant having covenanted to pay the plaintiff £1000 on or before the expiration of seven days after the arrival of the ship or vessel at Morden's Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according to the first rule upon the subject of dependent and independent covenants laid down in the notes to *Pordage v. Cole*. They also contended that the case fell within the third rule stated in these notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages. These rules are not pro posel for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord KENYON said, in *Porter v. Shepherd*, 6 T. R. 663 (3 R. R. 305), "Conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and technical words (if there be any to encounter such intention) should give way to that intention."

Now, what may fairly be considered to have been the intention of the parties upon the whole scope and object of the deed in question? Putting the agreement into a short form, it amounts to this: the defendant says to the plaintiff, "In consideration of your doing certain acts, and giving me a bond, with sureties, to secure the performance of your covenants to do these acts, I will

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pay you a sum of £5000 and give you a bond with sureties to secure the payment." And the plaintiff, on the other hand, covenants to do the acts and to give the bond in consideration of the performance by the defendant of the covenants on his part to be performed.

Upon this short summary of the deed there could scarcely be a doubt that either party might refuse to perform his part of the agreement, until he was secured by the bond of the other.

But the counsel for the plaintiff say, that the particular terms of the deed show that this could not be the intention. In particular they laid great stress on the word "forthwith," in the plaintiff's covenant, to procure the vessel, which they interpreted to mean "immediately," and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the defendant of £1000 before the expiration of seven days after the arrival of the vessel at Morden's Wharf, which might have happened within the ten days; and therefore they argued that the case in both these respects was within the first rule in the notes to *Pordage v. Cole*.

It appears to me that too great force was attributed to the word "forthwith" in the agreement, and that all that was meant by it was that the plaintiff was, without delay or loss of time, to procure a suitable vessel for receiving the telegraphic cable. And to quicken his diligence the defendant covenanted to pay him

£1000 within seven days after the arrival of the vessel at [\* 248] Morden's \* Wharf. Out of regard to his own interest, too,

the plaintiff would use all expedition in commencing the performance of the agreement, because, unless he had the vessel with the cable on board equipped and ready for sea by the 15th of July, he would have been liable to pay £200 per week for his default. I think that the plaintiff could not have been compelled to take a single step, nor to incur the smallest expense towards procuring the vessel, till he was secured by having the defendant's bond; and that if he chose to proceed without having this security, everything he did was at his own peril. If the defendant wished to obtain the plaintiff's progress within the ten

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days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the £5000 became due.

It is a strong circumstance indicative of the intention of the parties, that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given "for the true performance of the covenants hereinbefore contained." They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties. Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment.

I do not think that anything in favour of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other.

A supposed case was put at the Bar, of the plaintiff, after the ten days had expired without his bond having been given, going on to perform his covenants, and afterwards in an action to recover the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent, as an answer to the action.

Looking to the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations

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contained in the deed. For these reasons I think the judgment of the Exchequer Chamber ought to be affirmed.

*Judgment affirmed.*

#### ENGLISH NOTES.

The well-known rules as laid down by Saunders in the notes to *Poddage v. Cole*, 1 Saund. 319, 320, are the following : “1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent : and so it is where no time is fixed for performance of that, which is the consideration for the money or other act. But, 2. When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration for the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.”

The principal case shows that the above rules, though furnishing a valuable aid to the presumption of intention, are not necessarily conclusive, but that the intention to make the act a condition precedent may be inferred from the general tenor of the instrument, although the case may fall literally within the first rule.

The express proviso that something is to be a condition precedent will not make it so if it is impossible, or, perhaps, if it is unreasonable to expect that such a thing should happen before the payment becomes due on the principal obligation. This was assumed by all the learned Lords who decided the case of the *London Guarantie Co. v. Fearnley* (H. L. 1880), 5 App. Cas. 911. But the majority thought the proviso separable, and that one of the conditions expressed to be conditions precedent was capable of being performed before payment became due, and therefore that the express stipulation that it should be a condition precedent ought to be given effect to. In this case the defendants had entered into a guarantee policy against embezzlement by an employee of the plaintiff “subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy.” Then followed the proviso : “Provided that the employer shall if, and when,

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required by the company (but at the expense of the company if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement, by the employed, or by his estate, of any moneys which the company shall have become liable to pay." The plaintiff claimed under the policy a sum embezzled by the employee. The company pleaded that they had required the plaintiff to prosecute, but he had not done so. On demurrer to this plea, it was held by the majority, Lord BLACKBURN and Lord WATSON, that although the latter part of the proviso could not be a condition precedent, because the plaintiff could not assist the company in an action by them to recover the money until they had become liable to pay, the former part of the proviso might be, and was a condition precedent, because the plaintiff might have prosecuted, and it was reasonable to require that he should, in order to establish the fact of the embezzlement. Lord WATSON said (at p. 919): "Where the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a Court of law ought not to enforce it, or be *sua natura* incapable of being made a condition precedent." Lord SELBORNE, L. C., dissented on the ground that the latter part of the proviso could not be a condition precedent, and that it was not sufficiently clear that the former part could be detached and made a separate condition for any reasonable purpose. He considered that the intention of the former clause was only to facilitate the object of the latter, by removing any impediment which might exist to a civil remedy against the defaulter or his estate.

## AMERICAN NOTES.

Whether stipulations in a contract are conditions precedent to a right to enforce performance is to be determined by the intention of the parties, derived from the contract itself, by application of common sense to each particular case, rather than by technical rules of construction. *Leonard v. Dyer*, 26 Connecticut, 172; 68 Am. Dec. 382, citing *Stavers v. Curling*, 3 Bing. N. C. 355, and holding that in the absence of express stipulations, in a contract to transport lumber by vessel, the defendant was bound for freight on the part transported, the plaintiff being prevented from loading the remainder by reason of a freshet.

Plaintiffs agreed to set up a printing-press in the office of the defendant corporation, the defendant to have thirty days to decide whether to keep it, and plaintiff agreed to keep it in order permanently without charge. *Held*,

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that the agreement to keep it in order was not a condition precedent. *Prairie Farmer Co. v. Taylor*, 69 Illinois, 440; 18 Am. Rep. 621.

Judge BENNETT says (note, Benjamin on Sales, p. 559): "No other rule—worthy of the name of rule—can be laid down than that it is always a question of the intention of the parties, manifested by the expressions they have used as applied to the subject-matter of the contract, and read in the light of surrounding circumstances. And previous cases are not of much value in deciding upon subsequent contracts of different phraseology. The question does not depend upon any particular form of words, or upon any particular collocation of the different stipulations; but the whole contract is to be taken together, and a careful consideration had of the various things to be done, to enable one to decide correctly the order in which they are to be done." This language is substantiated by *Tipton v. Feitner*, 20 New York, 423 (citing *Withers v. Reynolds* (2 B. & Ad. 882); *Kane v. Hood*, 13 Pickering (Mass.), 281 (SHAW, Ch. J.); *Gill & McMahon v. Weller*, 52 Maryland, 8; *Goldsborough v. Orr*, 8 Wheaton (U. S. Sup. Ct.), 217 (STORY, J.); *Parmelee v. Oswego & S. R. Co.*, 6 New York, 74; *Barruso v. Madan*, 2 Johnson (N. Y.), 145: "With respect to such conditions, it is true that no technical words are requisite to render a condition precedent or subsequent, nor does it depend on the position of words, but it rests on the good sense and plain understanding of the contract, and the acts to be performed by the parties respectively." See *Wiley v. Inhabitants of Athol*, 150 Massachusetts, 426; 6 Lawyers' Rep. Annotated, 342.

"Stipulations in a contract are not construed as conditions precedent unless that construction is made necessary by the terms of the contract." *Deacon v. Blodget*, 111 California, 416.

In *Tipton v. Feitner*, *supra*, SELDEN, J., said: "As the effect of a condition precedent is to prevent the Court from dealing out justice to the parties according to the equities of the case, it is not surprising that we find it so frequently said that constructions productive of such conditions are not to be encouraged. Parties must be held strictly to their contracts, and where they have agreed in terms or by plain implication to a condition which is to bar them of a recovery according to what is equitable and just, they must abide by the consequences. But Courts are to see that such was the intention of the parties, before they are held up to so rigid a rule."

In *Johnson v. Reed*, 9 Massachusetts, 82, the Court cite several English decisions, and observe: they "show a disposition, on the part of Judges, to break through the bonds which some old cases had imposed upon them, and to adopt what Lord KENYON, in one of the cases, calls the common-sense doctrine,—that the true intent of the parties, as apparent in the instrument, should determine whether covenants or promises are independent or conditional, instead of any technical rules, of which the parties were totally ignorant, and the application of which would in most cases totally defeat their intention."

The foregoing views are adopted by Mr. Pomeroy in his work on "Specific Performance of Contracts," sect. 338.

No. 5.—*Chad v. Tilsed*, 2 Brod. & Bing. 403.—Rule.

## No. 5.—CHAD v. TILSED.

(c. p. 1821.)

## RULE.

IF the language of an ancient instrument be obscure or doubtful, constant usage may be resorted to, to expound, though not to control, the meaning.

**Chad v. Tilsed.**

2 Brod. &amp; Bing. 403–409 (23 R. R. 477).

*Ancient Grant.—Interpretation.—Ancient Usage.*

A grant of wreck was made by Henry II. to the proprietors of certain [403] lands on the coast, and confirmed by Henry VIII. The proprietors of those lands having, forty years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left almost dry at low water, and having ever since asserted, without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest: *Held*, that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and to establish the right so asserted.

Trespass *quare clausum fregit*. Pleas, first, general issue; second, leave and license; third, that the *locus in quo* was part of Poole harbour; fourth, that the *locus in quo* was an arm of the sea, and that the defendant entered there to fish, as he lawfully might. The replication traversed these pleas: the rejoinder took issue on the replication. At the trial before GRAHAM B., Dorchester Summer Assizes, 1820, the plaintiff, who was proprietor of Brownsea, an island of about one thousand acres, lying within the ambit of Poole harbour, deduced title to the island, including the *locus in quo*, from the Sturt family and the abbot of Cerne. A grant of wreck from Henry the Second, in the first year of his reign, 1154, to the abbot of Cerne, confirmed by *inspeximus* in the first year of Henry the Eighth, was proved; also, a grant from Henry the Eighth, in the thirty-sixth year of his reign, to the Earl of Oxford, of the island of Brownsea, and a grant of the same year from the Earl of Oxford to Richard Duke of the same island, with wreck of the sea. At one extremity of the island is a bay of about sixty acres, called St. Andrew's Bay, which, at low water, becomes a great expanse of uncovered mud, intersected

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by a small inlet or gully only a few feet wide, called, in the language of the country, a lake. In this lake there is about three or four feet water at low tide, and about the same depth over the adjacent mud at high tide. About forty years ago, Mr. Sturt, at a great expense, constructed an embankment all across the chord of St. Andrew's Bay, with a view to reclaim the mud and bring it into cultivation, and frequently made use of the seaweed, and mud and gravel, which was within the bank. The bay [\* 404] is about a mile and a half from Poole, in full \*view of the town ; and no opposition was ever made to Mr. Sturt's undertaking. The bank was afterwards forced by a storm, and the sea again entered the space within, at high tide. Mr. Sturt, however, always treated it as his exclusive property ; and no fisherman or other person was permitted to remain in the gully or lake, until Mr. Sturt's consent had been obtained. Repeated assertion of property, on his part, was proved ; and uniform acquiescence therein, as also collection of wreck in St. Andrew's Bay, and application of it to his own use. It was admitted that St. Andrew's Bay formed no part of the harbour of Poole, and that vessels of any burthen could never float there.

The case on the part of the defendant, who had insisted on fishing in the lake or gully within the artificial embankment, consisted of two grants of the *locus in quo* : the first to the Duke of Richmond, for thirty-one years, in the thirteenth year of Charles the Second ; the second to Robert Gifford, for forty-one years, in the seventeenth year of the same reign (wherein the spot in question was described as waste land, and ooze and ooze lands, the grantee having covenanted to endeavour to reclaim and bring it into cultivation within seven years), and of an attempt to prove that the *locus in quo* had, previously to Mr. Sturt's time, been commonly fished on ; as also afterwards, in defiance of his assertion of property. This, however, was not satisfactorily established ; and it appearing that nothing had ever been done under the grants of Charles the Second, the jury, without allowing the learned Baron to conclude his summing up, found a verdict for the plaintiff.

Lens, Serjt., in the last term had obtained a rule *nisi* for a new trial, chiefly on the ground that the soil between high and low water mark was vested in the Crown, and so open to the [\* 405] public, and that a mere grant \*of wreck did not convey any right to the soil : that the grants in the time of

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Charles the Second were utterly inconsistent with any such supposed right in the owners of Brownsea; for, if the soil of St. Andrew's Bay had belonged to them, the Crown never would have granted it to the Earl of Oxford: that, even if the grant of wreck could give any right to the soil of the shore, by the "shore" must be understood a certain space following the arc of the bay, upon which, indeed, a vessel might be wrecked, and not the soil of the centre of the bay, where, at high tides, vessels could not easily be lost: that if the law were thus, Mr. Sturt's acts were only acts of usurpation; and usage of forty years, founded on usurpation, could not confer a right. It was urged, also, that perhaps the corporation of Poole might have been in confederacy with Mr. Sturt, and that such a contrivance ought not to deprive the fishermen of their right to fish over the *locus in quo*. He cited *Vooght v. Winch*, 2 B. & Ald. 662 (21 R. R. 446).

Pell, Serjt., *contra*, insisted that what Mr. Sturt had done forty years ago, openly and unopposed, together with his subsequent assertion of property so uniformly acquiesced in, though not of themselves constituting any right, were evidence from whence anterior usage and anterior assertion of right might be presumed; that such anterior usage must be so ancient as to afford the best interpretation of the nature of the original grant; and that a prescription of such antiquity, coupled with the general grant, was quite conclusive as to the plaintiff's right.

Lens having been heard in support of his rule, the Court now gave judgment.

DALLAS, Ch. J.—I agree that cases of this sort may [\*406] rest on one or both of the two following grounds, that is to say, on grant, or on usage which presupposes a grant. I agree, also, that in the case of a grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage; but it is equally clear, that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence whence usage anterior to that time may be presumed; and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant. The rule laid down in a book of authority on this subject is, "If the

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language of an ancient grant be obscure or doubtful, constant usage may be resorted to to expound, though not to control, the deed ; and the uniform course of modern authorities shows that, however general the grant, usage may afford a true construction of it, reducing this question to a question of fact, namely, what was the usage here ? I agree that if the usage be only of forty years' duration, and be applied to establish an exclusive right over an arm of the sea, this could not destroy the right of the subject ; but we must look to the way in which this modern usage arose, and that is as strong as possible to establish the plaintiff's claim : his predecessor raises a bank in the face of the whole town of Poole, and, according to the pleas, in a place which was part of the harbour in which all the inhabitants of the town had an interest. This was done at considerable expense, and occupied a great length of time. After the bank had been broken down, there was no interruption of the plaintiff's assertion of his claim : permission

to enter within the bank was constantly asked, and given  
[\* 407] or \* refused as to the proprietor seemed fit. The usage

was as strong as it possibly could be under such circumstances. But it was asked, if the corporation of Poole had been in confederacy with the then proprietor of the island, and did not choose to sue upon this usurpation, should a poor fisherman by such means be deprived of his right ? Certainly not. However, if so general a right had existed, it may be presumed any usurpation on that right would have been resisted. And why are we to presume any such confederacy between the owner of the island and the corporation of Poole ? I have said, that where the words of a grant are general, they must be explained by usage. The grant of Henry the Second conveys the island of Brownsea and its shores. What, then, are its shores ? What usage has pointed out. And if I find the usage such as existed here, how can I resist the evidence ? It is urged that this is only a grant of wreck ; but wreck must rest on the soil, usage must determine what has been deemed soil, and vessels of burthen could at no time float over the mud in question. The lakes which have been mentioned were only such small inlets as everywhere intersect the shore. The grants of Charles the Second confirm this usage, inasmuch as those grants were never acted on or acquiesced in by the owner of the island. I think, therefore, the question has been properly disposed of, and that a new trial cannot be granted.

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PARK, J.—If the grants in question contained anything inconsistent with the usage established, the case might be different, but, the grant consisting of general words, we are driven to inquire what has been the usage under it. That is all one way, and it is reasonable to suppose it was the same in ancient times as at present. Nothing in the present decision will conflict with that of *Vooght v. Winch*, which only decided that, in a public navigable \* river, twenty years' possession of the water at [\* 408] a given level is not conclusive as to the right.

BURROUGH, J.—The verdict in this case is not contrary to the legal effect of the evidence, but serves to confirm the construction put on the grants. The first contains a grant of wreck to the abbey of Cerne, throughout all their lands upon the sea, which shows they had other lands besides the mainland of Brownsea; now what could these other lands be but the land in question? As to the grants produced by the defendant, deeds produced by a party avail him nothing, unless the possession has gone consistently with them. Here, the parties who received the first grant from Charles the Second did nothing under it; then other adventurers came forward, who also failed to make any attempt conformable to their grant. For what reason did both these parties, who thought it beneficial to take the grant, abstain from acting under it, but because they found a person in possession under a former grant? Then, the assertions of right on the part of the plaintiff are strong beyond all measure; and though the erection of the bank forty years ago would not of itself confer a title, yet, from such erection unopposed and the subsequent uniform usage, prior usage to the same effect may be presumed, which, coupled with the general terms of the grant, establish the plaintiff's claim beyond dispute.

RICHARDSON, J.—The evidence of assertion of right on the part of the plaintiff and those under whom he claims is indeed abundantly strong; however, I should agree that the legal effect of this evidence would not invest him with a title, and that the whole might amount to nothing more than usurpation, if it were quite clear that, prior to the construction of the embankment forty years ago, the public had any right over the *locus in quo*. \* But in this case, as in every other, modern usage of [\* 409] forty years' duration is evidence not only for that period, but evidence from which it may be presumed that the same course was pursued in earlier times, if nothing is shown to the

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contrary. Here there was evidence that the usage had been the same almost time out of mind; that the land in question was *littus maris*, not indeed so dry as *terra firma*, but still shore of the sea, and not covered at low water, with the exception of a small lake or inlet: the place, therefore, falls within the description of land, about which there can be no doubt as to the law, that an individual may claim a right in it, either by grant or by usage independently of grant. Most of the evidences which Hale (*De Jure Maris*, pars. 1, c. 6, p. 27) enumerates as denoting such a right exist here: “constant and usual fetchirg gravel and seaweed and sea-sand, between the high water and low water mark, and licensing others so to do; enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand.” The grants of Charles the Second call the spot in question ooze land, and, therefore, are evidence to show that, even in those days, the place was considered as between high and low water mark; and, as nothing was done under them, they rather make against the defendant than for him, as it should thereby seem that, when the grantees came to act under their grant, they found an obstacle in an earlier and better title.

## ENGLISH NOTES.

The case of *Beauchamp v. Winn*, decided by the House of Lords in 1873, is a notable instance.

The evidence of usage was employed to explain an ambiguous expression in a grant of 1799, which followed the terms of older leases, and particularly of a lease made in 13 Charles II. of (*inter alia*) “all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in B., &c., and that ledge or house thereupon built, &c.; and also all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in R., &c., both of which said warrens of conies are called or known by the name of B. warren, and do extend themselves in and over the wastes or moors of B., F., S., and A., &c.” The question was whether the grant carried the soil of the ground including the minerals, or only a franchise in the nature of a right to preserve chase and kill the rabbits. Of course “the ledge or house thereupon built,” an expression contained both in the lease of 13 Charles II. and in the grant of 1799, was much pressed in support of the former construction. And so was the expression “which warren of conies extends itself in and over the wastes, &c.” Lord CHELMSFORD, in advising the House, observed: “Where a term

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is ambiguous, and capable of having more than one meaning attributed to it, it cannot be improper to determine how it ought to be construed in the instrument under consideration, by ascertaining the sense in which it has been used in its application to the same subject on previous occasions. The term ‘warren’ is one of those terms which has not always the same precise and definite meaning. It may be the expression of the grant of a franchise only, or it may import a conveyance of the soil.” Then, after dealing with the critical arguments above referred to, he said (L. R. 6 H. L. 240): “The whole of the argument founded upon the terms of the leases and the grant was met by showing that from first to last the owners of the warren have never claimed or attempted to exercise any rights as to the soil. They have invariably acted as being merely in possession of what may be shortly described as a rabbit warren. This was distinctly admitted by the Solicitor-General, who said, if the soil did not pass to the Earl under the grant, there has been no such possession of it as to give a title by wrong. Now, both privately and publicly, when the right was exercised, and when it was formally claimed, it was always limited to a right in respect of the conies. The leases which were made by the owners of the warren were of the right of breeding and killing rabbits. Under two Inclosure Acts it became necessary to state the nature of the claim upon which allotments were to be made. In 1801 the Ashby Inclosure Act passed, and Thomas Pindar, the grantee, in the Duehy grant of 1799, claimed and received an allotment for a right of warren over the East Common. Again, in 1831, the Frodingham Inclosure Act passed, and again the claim for an allotment was founded on a right of warren for conies. That the right was limited as described, appears to me conclusively proved by the Parliamentary survey of the manor and soke of Kirton, in 1649, in which is contained, amongst other subjects within the manor, ‘all that warren or game of conies in Bromley and Redburne.’ Afterwards, in the particulars of sale of the estates of Charles I., produced from the Exchequer Augmentation Office, the same description is found, with the addition that the burrows extend themselves a certain distance into the wastes or moors adjoining to the fields of Frodingham and Scunthorpe. All this furnishes the most satisfactory evidence that the warren of conies granted to Thomas Pindar, in 1799, did not pass the soil of the wastes and commons in and over which it extended.”

The other learned Lords, Lord COLONSAY and Lord O'HAGAN, dealt with the evidence on a similar principle and arrived at the same conclusion. *Earl Beauchamp v. Winn* (1873), L. R. 6 H. L. 223.

A nearly similar expression in a lease by the Dean and Chapter of Ely, dated in 1866, and earlier documents, came to be construed by Mr. Justice FRY in *Robinson v. Duleep Singh* (1879), 11 Ch. D. 823. The

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subject there described was "all that warren of conies in L. as it is there marked out and described by its proper metes, boundaries, and borders." Mr. Justice FRY, after citing passages from the judgments in *Earl Beauchamp v. Winn*, said: "From these passages and from the whole of the case, I conclude that I ought to look at two things in the construction of this instrument. I must first inquire what was the ordinary meaning and understanding of the expression 'warren of conies at L.' at the time when the instrument was executed, and for that purpose I must look at the antecedent usage in the neighbourhood among the persons who were conversant with the property in question, and then I must undoubtedly look at the whole context and frame of the instrument in which the words occur." As to the local usage, there were proceedings in a litigation between the Dean and Chapter of Ely and Sir Simon Stuart (a predecessor in title of the defendant) in 1740 in which the expression is used "warren and other lands." And there was also evidence of entries in the parish rate-books before the Rating Act, 1874, and therefore at a time when a person could not be rated in respect of a mere franchise, showing that the lessee for the time being of the Dean and Chapter was rated for "a warren of conies." Upon the whole he came to the conclusion that the "warren of conies" demised by this particular instrument was a piece of land.

## AMERICAN NOTES.

This case is cited in 1 Greenleaf on Evidence, sect. 293. The doctrine was applied by the Chancellor of New York, in *Meriam v. Harsen*, 2 Barbour Chancery, 246, holding that an acknowledgment by a married woman of her deed, separate and apart from her husband, and without any fear, threat, or compulsion of him, was sufficient although the additional statutory word "freely" was not employed.

So in *Farrar v. Stackpole*, 6 Maine, 154, usage was received to show that by a deed of a saw-mill and the appurtenances, the chain, dog, and bars passed.

Usage has been shown to explain the following words in deeds:—"Gravel": *Brown v. Brown*, 8 Metcalf (Mass.), 573; "waste lands": *Prather v. Ross*, 17 Indiana, 495; "zinc" and "premises": *New Jersey Zinc Co. v. Boston F. Co.*, 15 New Jersey Equity, 418; "colliery": *Carey v. Bright*, 58 Penn. State, 70; "timber for building": *Livingston v. Ten Broeck*, 16 Johnson (N. Y.), 14; 8 Am. Dec. 287; "deepening the ditch": *Collins v. Driscoll*, 34 Connecticut, 43. So to show that lines were run by the magnetic meridian. *Jenny Laid Co. v. Bower*, 11 California, 194.

The practical interpretation of the parties themselves, by their acts under a deed, is entitled to great if not controlling influence.

So in *Frazier v. Myers*, 132 Indiana, 71, where there was a grant of a right of way, "not to be fenced," evidence was admitted that gates had always been maintained across it. So to explain "square inch of water" in a deed of a mill. *Janesville Cotton Mills v. Ford*, 82 Wisconsin, 416. So

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to show the true boundary, in *Lovejoy v. Lovett*, 124 Massachusetts, 270. So to explain "including" in a deed. *Gray v. Clark*, 11 Vermont, 583. So to define "Derry old line" in a deed: *Hall v. Davis*, 36 New Hampshire, 569; and "Shirley line" and "Lunenburg line" in a deed: *Putnam v. Bond*, 100 Massachusetts, 58; 1 Am. Rep. 82. Reputation is sufficient to show the *locus in quo* when not clearly shown in a deed. *Davis v. Fuller*, 12 Vermont, 178; 36 Am. Dec. 334; to the same effect, *Bybee v. Hageman*, 66 Illinois, 519; *Shore v. Miller*, 80 Georgia, 93; 12 Am. St. Rep. 239.

## No. 6.—HARE v. HORTON.

(1833.)

## No. 7.—LINE v. STEPHENSON.

(EX. CH. 1838.)

## RULE.

FROM the expression of a particular subject to be conveyed, or of a particular obligation entered into, may be inferred the intention to exclude another subject or obligation which the general words of the instrument would have been sufficient to include.

*Designatio unius est exclusio alterius.*  
*Expressum facit cessare tacitum.*

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5 Barn. &amp; Adol. 715-730.

*Conveyance of Fixtures.* — *Designatio unius est exclusio alterius.*

A., by a deed of mortgage, granted, bargained, sold, released, and confirmed to B. (in his possession then being by a previous bargain and sale) an iron-foundery and two dwelling-houses, &c., and the appurtenances; together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses; and all trees, houses, cottages, commonous, &c., easements, profits, &c., to the said foundery, messuages, and lands appertaining. There were cranes, presses, a steam-engine, and other fixtures in the foundery, used for the purposes of the business carried on there, and valued at £600. Held, that the specification of the grates and other fixtures in and about the dwelling-houses showed that those in the foundery were not intended to pass, though they would have passed if the others had not been mentioned.

Case. The declaration stated that before and at the time, &c., divers, to wit, ten iron-foundries, machinery, apparatus and

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furniture, ten messuages or dwelling-houses, ten warehouses, ten shops, ten yards, and ten gardens, with the appurtenances, situate, &c., and divers, to wit, twenty cranes, twenty boilers, twenty furnaces, twenty steam-engines, &c. (describing many other articles of machinery), twenty desks, twenty tables, &c. (describing other furniture, and tools), were in the possession and occupation of William Bailey, as tenant thereof to the plaintiff, the reversion thereof belonging to plaintiff: and that defendant, contriving and intending to injure plaintiff in his reversionary estate in the said foundries, machinery, &c., with the cranes, boiers, &c., whilst

[\*716] the same were in the possession of W. B. as tenant to plaintiff, and whilst plaintiff was so interested \*in the same as aforesaid, viz., on, &c., wrongfully and unjustly, without the leave, and against the will of plaintiff, "broke and entered the said iron-foundries, machinery, apparatus, and furniture, messuages or dwelling-houses, warehouses, &c., with the appurtenances, cranes, boilers, and furnaces, and other goods and chattels before mentioned, and tore up, broke down, pulled to pieces, prostrated, and destroyed the same, and seized, took, and carried away, and afterwards, on, &c., converted to his own use, the said machinery, apparatus and furniture, boilers, cranes, and furnaces, and other goods and chattels before mentioned, and things which were affixed to the reversionary estate and interest of the said plaintiff in the said iron-foundries, machinery, apparatus, furniture, messuages or dwelling houses, warehouses, &c., with the appurtenances, cranes, boilers, &c., and other goods and chattels before mentioned, and scattered and spread the same over with large quantities of bricks, stones, mortar, and rubbish, and continued the same so scattered and spread, greatly injuring the said reversionary estate of the said plaintiff therein, from thence hitherto." By means whereof plaintiff was greatly injured in his said reversionary estate of and in the said iron-foundries, machinery, &c. There was also a count in trover for like goods and chattels to those above mentioned. Plea, not guilty.

At the trial before PARKE, J., at the Stafford Spring Assizes, 1833, the following facts appeared. In December, 1830, Bailey entered into an agreement with the defendant to buy of him the fee-simple of an iron-foundery, lands, and dwelling-houses, at

[\*717] Great Bridge in Staffordshire, for £4500; and at the same time the parties signed \*an agreement, not under seal,

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for the purchase by Bailey of the defendant's goodwill in his business of a gasometer-maker at £200, and also of his stock and implements of trade, tools and fixtures, in the warehouses, shops, &c., occupied by him at Great Bridge aforesaid, at a valuation to be taken as in the agreement was mentioned, the amount to be paid by instalments at stated periods, and the payment to be secured by certain promissory notes: and it was further agreed, that the defendant should have the use of a house and garden, &c., part of the premises, till Christmas, 1831, and should be at liberty to finish certain works, then in the course of manufacture, upon the said premises. For the purpose of raising a part of the purchase-money, Bailey and the defendant executed a mortgage deed to the plaintiff, which was in substance as follows:—

By indenture, bearing date the 22nd of February, 1831, between the defendant of the first part, William Spurrier of the second part, the said William Bailey of the third part, and the plaintiff of the fourth part, reciting certain indentures of lease and release of the 7th and 8th of December, 1825, whereby all that iron-foundery, together with the two dwelling-houses, warehouses, shops, yards, garden, and appurtenances thereto belonging situate at or near Great Bridge, &c., formerly in the occupation, &c., and also all that close, called the Foundery Field, situate near Great Bridge aforesaid, adjoining, &c., then in the occupation, &c., together with their rights, members, and appurtenances, were conveyed, limited, and assured to such uses as the defendant should appoint, and in default of appointment to the use of him and his assigns during his life, with a limitation to the use of Spurrier, his executors, &c., during the life of the defendant, remainder to the use of the defendant in fee; \* reciting, [\* 718] also, that the defendant had contracted with Bailey to sell him the fee-simple of the foundery, messuages, lands, and other hereditaments intended to be by that deed appointed and released, for £4500; reciting, also, that Bailey had requested the plaintiff to lend him £3500 to enable him to complete the purchase, and the plaintiff had agreed to do so on having the said sum and interest thereon secured by mortgage on the said foundery, messuages, lands, and other hereditaments, as after mentioned: it was witnessed, that, in pursuance of the agreement on the part of the defendant, and in consideration of £1000, part of the purchase-money, paid to him by Bailey, and £3500, the residue, paid to

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him by the plaintiff, and by virtue of the above-mentioned power of appointment, the defendant appointed that the foundery, messuages, lands, and other hereditaments after mentioned, &c., with their appurtenances, should go and remain to the use of the plaintiff in fee, upon the trusts, &c., after mentioned. And Spurrier, in consideration, &c., and at the request and by the direction of the defendant and Bailey, did bargain and sell, and the defendant, at the request, &c., of Bailey, did grant, bargain, sell, alien, release, and confirm to the plaintiff (in his possession then being by a previous bargain and sale) and his heirs, all and singular the said iron-foundery, together with the said dwelling-houses, warehouses, shops, yards, gardens, and appurtenances thereunto belonging, and thereinbefore more particularly described, and then in the occupation, &c.; and also all that close called the Foundery Field before described, and the dwelling-houses or buildings erected thereon, and all other the hereditaments conveyed in and by the before-recited indentures of lease and release (with the exception therein made of certain mines, minerals, &c.); [\* 719] \*“ together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses and the brew-houses thereto belonging; and all fruit and other trees growing upon the said premises; and all houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow and pasture feedings, woods, underwoods, and the ground and soil thereof, commons, &c., and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said foundery, messuages, lands, and other hereditaments hereby released or otherwise assured, or intended so to be, or any of them respectively, belonging or in anywise appertaining, or accepted, reputed, held, &c., as part, parcel, or member of the same or any of them respectively; and the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said foundery, messuages, lands, and other hereditaments hereby released, &c., and every part and parcel of the same, with their and every of their rights, members, and appurtenances; and all the estate, right, title, interest, &c., of the said William Spurrier and Joshua Horton (the defendant), and each of them, of, into, and out of the said foundery, messuages, lands, and other hereditaments, and

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every part and parcel of the same, with their rights, &c.: " *habendum* to the plaintiff in fee, upon and for the trusts, intents, and purposes, and with, and subject to the powers, provisoos, agreements, and declarations thereinafter expressed concerning the same. The deed also contained a proviso for reconveyance by the plaintiff to Bailey, his heirs, &c., on repayment of the £3500 and interest; a power to the mortgagee to sell on default in payment of the principal or interest; and a proviso, that [\*720] Bailey should hold and receive the rents, issues, and profits of the hereditaments by that indenture appointed and released, without let, &c., by the plaintiff, until such default should be made.

The above deed was executed by the defendant and Spurrier (neither the plaintiff nor any person on his behalf being present), and witnessed by Mr. Fellows, the defendant's attorney, and Mr. Caldecott, his mining agent. The deed was then delivered to Caldecott, but there was no evidence of his having delivered it to the plaintiff, except that the plaintiff produced it at the trial.

Bailey was let into possession, and, at the time next mentioned, was in the exclusive occupation of the premises, machinery, and other property, except the house and garden mentioned in the agreement of December, 1830. In June, 1831, a dispute having arisen between Bailey and the defendant as to the fulfilment of that contract, the defendant, with a number of men, entered the foundery, carried away the tools and other movables, and severed and took away, among other things, a steam-engine, cranes, presses, frames for gasometers, and other apparatus, all fixed into the earth or walls, doing thereby much unnecessary damage to the premises. For the injuries caused by this proceeding to the plaintiff's reversionary interest the present action was brought. The value of the fixtures and tools was stated at the trial to be £1545. The plaintiff was nonsuited, but leave given to move to enter a verdict for £600, the value of the fixtures, or £35, the amount of damage done to the freehold in removing them. The points reserved were: First, Whether the fixtures annexed to the foundery passed to the plaintiff by the \* mortgage [\*721] of February, 1831? Secondly, Whether on the present declaration the plaintiff could recover for the alleged injury to the freehold? Thirdly, Whether the instrument of mortgage was delivered as a deed, or only as an escrow? A rule *nisi* having been obtained,

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Maule and R. V. Richards now showed cause. As to the first question, *Ex parte Quincy*, 1 Atk. 477, as far as it is an authority on the point, tends to show that the fixtures would not pass by the mortgage deed. The language there used is indeed loose, and no satisfactory reason is assigned. But in the present case, the words of the deed clearly show the intention not to pass the fixtures belonging to the foundery. The grant is, "of the said iron-foundery, together with the said dwelling-houses, warehouses," &c.; after which nothing is said of the fixtures belonging to the foundery; but the deed goes on: "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses and the brewhouses thereto belonging." [PATTESON, J.—If there are three houses mentioned, and a grant of fixtures refers only to those in two, can it be said that those in the third will pass?] The maxim *expressio unius est exclusio alterius* would apply. But the case here is even stronger, for the general mention of fixtures is preceded by that of "grates, boilers, and bells;" and the rule is, that where an enumeration begins with the mention of particular things, subsequent general words only carry things *cujusdem generis*. If, therefore, the enumeration in this case had been applicable to the foundery as well as the dwelling-[\*722] houses, still the grant would not have passed \* fixtures of a more important kind than those first named. The Court, in construing an instrument like this, may look to the intention of the parties, as was done in *Colegrave v. Dias Santos*, 2 B. & C. 76, and if matter *dehors* the deed be admissible to explain that intention, which was left undetermined in *Thresher v. The East London Water-works Company*, 2 B. & C. 608 (26 R. R. 486), the agreement of December, 1830, goes far to show that the fixtures in question were not meant to pass to the plaintiff by this mortgage. As to the second point, if these fixtures did not so pass by the deed, there is no proof of any injury sustained by the plaintiff, to which the declaration is applicable. Thirdly, the instrument of mortgage was delivered by the defendant to Caldecott merely as an escrow, to be the defendant's deed on the performance of the previous agreement by Bailey, and any misconduct of Caldecott in parting with it before the proper time could not alter its nature. It is indeed laid down in Com. Dig. Fait (A. 3), that if one deliver a writing, as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed pres-

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ently, and if the party obtains it, he may sue before the condition performed, and *Degory v. Roe*, 1 Leon. 152, Moore, 300, 13 Vin. Abr. Faits (M.), is cited. But it is pointed out in *Johnson v. Baker*, 4 B. & Ald. 440 (23 R. R. 338), that that *dictum* in Comyn rests upon an erroneous report of the case referred to, which was, in fact, decided the contrary way.

Talfourd, Serjt., Cripps, and Hoggins, *contra*. — The fixtures in the foundery passed by the \*mortgage deed. *Accessorium sequitur suum principale*, Shepp. Touchst. \*89, 7th ed., [\*723] by Mr. Preston, and it is there laid down that, “by the grant of mills, the waters, floodgates, and the like, that are of necessary use to the mills, do pass;” and the editor adds, “also a stone belonging to the mill, though separated from the mill to be new worked.” In the present case, many of the articles were necessary for the purposes of the iron-foundery, or for carrying on the business of a gasometer-maker. [PATTESON, J.—In *Place v. Fagg*, 4 Man. & Ry. 277, it was held, that by mortgage of a mill the millstones and tackling passed. There will hardly be any dispute on this point; the question will be, whether the effect of the deed as to these fixtures is not limited by the subsequent parts.] The express mention of the fixtures in and about the dwelling-houses will not prevent the fixtures at the foundery from passing by the general words “the said iron-foundery.” “If a man has a house in A., and houses and lands in B., and devises his house in A. to one, and (having demised the houses and lands to D. rendering rent) all those his lands, meadow, and pasture in B. to another, his houses there pass by the word ‘lands,’ though he mentions his house in A. expressly.” Com. Dig. Grant, E. 3, citing 2 Roll. 57, l. 20. Where the land is granted, everything which is inseparable from the soil must pass. If houses would pass, the same reason would extend to the cranes in this case, which are fixed deeply in the ground. And deeds are to be construed most strictly against the grantor. This is an acknowledged principle of law, and the rule for construing maxims and applying them in practice is to see if they go in accordance with and extend an \*acknowledged principle; but [\*724] to give the effect contended for to the maxim *expressio unius, &c.* (which is rather a maxim of reason than of law), would be to contract the operation of the principle just referred to. If the things expressed had been such as would not necessarily

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pass by the deed, as benches, weights and scales, or water-tubs, the naming of these would have excluded other things of the same description not named. But the fixtures in question did not require to be named or referred to in this deed, and the mention of them should not prejudice the plaintiff, for *utile per inutile non vtiatur*. Any mention of them was nugatory: *expressio eorum que tunc insunt, nihil operatur*. If the fixtures mentioned be understood as those of the dwelling-houses and brewhouses only, it may be that those particular fixtures were mentioned from an apprehension that they might otherwise have been understood to be removable as tenant's fixtures, upon the grounds stated in *Grymes v. Boweren*, 6 Bing. 437, though no such question could arise as to those in the foundery. As to these last, *Ex parte Quincey*, 1 Atk. 477, is no decision in favour of the defendant, for it does not appear that that case was finally decided; and if the language there used raises any doubt, *Colegrave v. Dias Santos*, 2 B. & C. 76, shows clearly that fixtures will pass by a conveyance of the freehold, if there be no contrary intention expressed. *Thresher v. The East London Water-works Company*, 2 B. & C. 608 (26 R. R. 486), supports the same proposition; and these cases show *Ex parte Quincey* to be no authority for the purpose for which it is cited. It might further be contended, if necessary, that the machinery and engines let into the

[\* 725] \*ground passed under the description of "edifices and buildings," "to the said foundery, messuages, lands, &c., belonging." *Naylor v. Collinge*, 1 Taunt. 19 (9 R. R. 691). That was a case of annexations made to the freehold by a tenant for the purposes of trade; yet it was held that the right to remove was controlled (as to the buildings let into the soil) by the covenant to yield up all buildings in good repair; and the Court said that if there had been an intention to exclude anything, it should have been expressed. Here, even supposing that the machinery might have been removed before the vendor gave up possession, still, after the plaintiff had had possession, the right was gone. *Colegrave v. Dias Santos*, 2 B. & C. 76, and *Lee v. Risdon*, 7 Taunt. 188 (17 R. R. 484), there cited. The defendant is estopped from denying that the plaintiff had received possession by his own mortgage deed, where he releases to the plaintiff the premises "in his possession then being," &c. In *Steward v. Lombe*, 1 Brod. & Bing. 506 (21 R. R. 700), land had been mort-

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gaged, together with a windmill which was upon it, fastened to the soil, but capable of being removed; the mortgagor remained in possession; but it was nevertheless held, that the conveyance to the mortgagee prevented a creditor of the mortgagor from taking the mill under a *fit. fact.* The present deed clearly expresses the intention of the defendant and Spurrier to pass to the plaintiff every right and interest which they had in these premises. The only exception from the grant is of the mines and minerals reserved by the indentures of 1825: no exception is made of fixtures.

Secondly, the declaration is in an ordinary form, and it was not necessary to prove all the allegations. It alleges that the defendant broke and entered the \* iron-foundries, [\* 726] machinery, messuages, dwelling-houses, &c., and tore up, broke down, prostrated, and destroyed the same. That includes the buildings as well as machinery; the declaration, therefore, does state an injury to the substance of the freehold. If the defendant had a right to take the fixtures, he is liable for injuring the premises. It was an excess, which might have been new assigned in an action of trespass, if the plaintiff had been in a situation to bring one: it was also provable under the general issue.

As to the other point, the deed is found in the possession of the plaintiff. The production of it by him was sufficient, *prima facie*, to show that it was delivered to him as a deed. It did not lie upon the plaintiff to prove that Bailey had performed his part of the agreement between him and the defendant.

PARKE, J.<sup>1</sup>—I am of opinion, and the rest of the Court agree with me, that this rule must be made absolute to a certain extent. The first question is, whether the fixtures at the foundry passed to the plaintiff by the mortgage deed. Looking at all parts of the deed, and especially at the manner in which the conveyance is qualified as to fixtures by the reference to the dwelling houses, I am of opinion that the fixtures in question did not pass. *Prima facie*, the mere conveyance of the foundry would have passed them; but we must look to the deed to see how far that is controlled by subsequent words; and I think no reasonable person can doubt, that, if a transfer of those fixtures had been contemplated, different expressions would have been used. The grant-

<sup>1</sup> DENMAN, Ch. J., was attending the Privy Council.

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[\* 727] ing part of the deed (to which the appointing \* part refers) is as follows. (His Lordship then read the description of the premises and other matters conveyed, as it is set out, *ante*, p. 702.) Now, I think it is impossible to suppose that if the parties making this grant had intended to convey by it fixtures which are valued at more than £600, they would have omitted to mention those, and inserted others which are of much less importance. It seems to me, therefore, that the intention was to pass the walls of the foundery, and nothing more; and consequently the plaintiff must fail as to that part of the case. Then is he entitled to recover £35 for the alleged injury to the reversion? When I first looked into the declaration, I thought it did not meet the case in this respect: it is only upon examining it more narrowly that I find enough stated to entitle the plaintiff to recover. The real complaint is, the entry of the defendant to take away, and his taking away, these fixtures. But the first count contains a number of allegations, which may be read disjunctively. It states that the defendant entered into ten iron-foundries, machinery, apparatus, and furniture, ten messuages, &c., and twenty cranes, &c., in the possession of Bailey as tenant to the plaintiff. There is nothing which obliges the plaintiff to show that Bailey was his tenant both of the walls and the fixtures; the count may therefore be read as if it merely stated that the foundries and messuages were in Bailey's possession as tenant. It then goes on to state that the defendant, contriving to injure the plaintiff in his reversionary estate and interest in the said iron-foundries, machinery, apparatus, and furniture, messuages, &c.,

with the cranes, &c., before mentioned, tore up, broke [\* 728] down, pulled to pieces, and destroyed \* the same, and scattered and spread the same with rubbish, greatly injuring the plaintiff's reversionary interest therein. The allegations may be taken distributively, and we may read a portion of the count as if it contained merely the simple statement that the plaintiff was entitled to a reversionary interest in the foundery, and the defendant wrongfully entered into it and pulled down a part. That was all which the plaintiff was under the necessity of proving. The defendant's case is, that he entered in exercise of a right; but if that had been specially pleaded, the excess might have been new assigned, and the jury here have, in effect, found such excess. Stripping the statement of unnecessary allegations,

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it amounts to a complaint that the defendant, in removing the fixtures, did a damage to the premises, which need not have occurred if the removal had been carefully made. The plaintiff is therefore entitled to a verdict for £35, unless the instrument of mortgage was improperly admitted as a deed. I said at the trial, that although there was evidence that the deed was at first delivered as an escrow, yet its being afterwards found in the plaintiff's possession was some evidence that the condition upon which it was so delivered had been complied with; and the defendant should, if it had been in his power, have shown the contrary. I still remain of that opinion.

TAUNTON, J.—On the first point I confess I have not been able to entertain much doubt. It is very plain, that if the granting part of the deed had only mentioned the foundery, messuages, and dwelling-houses, the foundery fixtures, as well as those in the dwelling-houses, \* would have passed: there are [\* 729] many cases which show this. But as the deed goes on to say, “together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses,” I think the mention of these fixtures excludes those in the foundery, on the principle, *expressio unius est exclusio alterius*. Why, it may be asked, were these particular ones mentioned if the whole were intended to pass? Besides, the mention of bells and other fixtures of an inferior kind shows that fixtures of greater value and on a larger scale were not contemplated. And in the recital of the plaintiff's agreement to lend money, in the early part of the deed, it does not appear that any security was proposed beyond that of the real property. As to the second point, the declaration is nearly silent on that which is the real gist of the action; namely, the taking away of the fixtures without due care to avoid damaging the premises. Almost the whole of the first count is pointed to acts of force, not negligence, and seems to have been framed on the speculation that the taking of the fixtures could be made the cause of action. There are, however, some words in that count which cannot be rejected, and which amount to an allegation, divisible from the rest, of a cause of action upon which the plaintiff is entit'ed to recover. It is stated that the defendant broke and entered the iron-founderies, machinery, and apparatus, and tore up, broke down, pulled to pieces, prostrated, and destroyed the same; that is, all these, or some or one of these things, which includes, among the rest, the

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walls of the foundery ; and that so the plaintiff was damaged in his reversionary interest to an amount covering the sum found by the jury. We cannot say, therefore, that the declaration is wholly beside the cause of action. As to the third point, [\*730] the \* fact of the deed being in the plaintiff's possession was *prima facie* evidence of its having been delivered to him as a deed.

PATTESON, J. — I have had considerable doubt on this case, but am now satisfied that the mortgage deed did not carry the fixtures. I should be sorry to bring into question the decision of this Court that a conveyance of premises will pass all that is attached to them ; and at first I thought that the language of the appointment in this deed was large enough to carry the fixtures in question ; but that clause refers to the granting part ; and we there find that the defendant and Spurrier grant and confirm the iron-foundery, &c., together with all grates, bells, boilers, and other fixtures in and about the two dwelling-houses ; and, therefore, the rule applies, *expressio unius est exclusio alterius*. As to the declaration, I am now of opinion, though I at first thought otherwise, that it is sufficient to include the present cause of action. The first count is for an injury to the plaintiff's reversionary interest in houses, foundery, and fixtures. The plea of not guilty, if put into other words, alleges that the plaintiff had no reversionary interest in the fixtures ; and, as to the supposed injury to the building, that the defendant acted in exercise of his right, doing no unnecessary damage. The plaintiff, by joining issue, denies the assertion that the defendant did no unnecessary damage. On the third point, a sufficient answer has been given.

*Rule absolute to enter a verdict for the plaintiff for £35 on so much of the first count as relates to the injury to the reversion. The verdict to be for the defendant on the rest of the first count, and on the second.*

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4 Bing. N. C. 678-684 ; 5 Bing. N. C. 183-186.

*Demise. — Covenant for Quiet Enjoyment. — Expressum facit cessare tacitum.*

[678] The whole covenant implied in the word "demise" is restrained by an express covenant for quiet enjoyment.

## No. 7.—Line v. Stephenson, 4 Bing. N. C. 678, 679.

The declaration stated, that on the 27th of October, 1836, by a certain indenture then made by and between Thomas Gutterson of the one part, and the plaintiff of the other part, the said T. Gutterson, for the consideration therein mentioned, did demise, lease, and to farm let unto the plaintiff two messuages, &c., to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, from the 25th of December then next ensuing, for and during and unto the full end and term of forty-nine years, wanting ten days, from thence next ensuing, and fully to be complete and ended, yielding and paying therefor the rent of £80 a year. And the said T. Gutterson did, by the said indenture, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the plaintiff, his executors, administrators, and assigns, that he the plaintiff, his executors, administrators, and assigns, paying the said yearly rent of £80, and observing, performing, and keeping all and singular the covenants and agreements in the said indenture contained, which on his and their part were and ought to be observed, performed, and kept, according to the true intent and meaning of the said indenture, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy, all and singular the several messuages or tenements and premises, with the appurtenances thereunto belonging, for and during the said term, without any let, suit, trouble, hindrance, or interruption whatsoever, by or from the said T. Gutterson, his executors, administrators, or assigns, or any person or \* persons claiming or to claim from, [\* 679] through, under, or in trust for him, them, or any of them.

Breach, that the said Thomas Gutterson had not, at the time of the sealing and delivery of the said indenture, or at any other time during his lifetime, nor had the defendants at any time before the commencement of this suit, power and authority to demise, lease, and to farm let the said messuages or tenements and premises, with the appurtenances, to the plaintiff, his executors, administrators, and assigns, for and during the full end and term of forty-nine years, wanting ten days, as in the indenture was mentioned, by means of which said several premises the plaintiff lost and was deprived of several sums of money paid, laid out, and expended by the plaintiff, in and about the pulling down, altering, rebuilding, amending, improving, cleansing, and repairing the said several messuages or tenements, so alleged to be demised to the plaintiff as aforesaid.

No. 7. — *Line v. Stephenson*, 4 Bing. N. C. 679—683.

Demurrer, for that the mere want of power to grant the lease for the full term of forty-nine years, wanting ten days, did not appear on the face of the declaration to be a breach of the express covenant declared upon; that the subsequent allegations as to the loss of the money expended, and as to the not keeping and breaking the covenant, were too general; and that the supposed breach or breaches, or what was alleged as such, was merely a state of facts, which, though consistent with the supposition of there having been a breach, might yet have arisen without any breach at all; and that no sufficient breach was alleged.

Joinder.

Channell, in support of the demurrer. — The express covenant for quiet enjoyment during the term qualifies and restrains [\* 680] the covenant in law contained in the word \* “demise.” *Nokes's Case*, 4 Co. Rep. 80 b.; *Merrill v. Frame*, 4 Taunt. 329 (13 R. R. 612).

Ogle, for the plaintiff. — Under the word “demise” two covenants are implied: one, that the lessor has power to create the term, *Frus r v. Skey*, 2 Chitty, 646; the other, that the lessee shall have quiet enjoyment: and though an implied covenant is controlled or extinguished by an express covenant to the same effect, yet both the covenants implied in the word “demise” are not extinguished by an express covenant on one point only. He further cited *Norman v. Foster*, 1 Mod. 101; *Gainsford v. Griffiths*, 1 Saund. 59; *Barton v. Fitzgerald*, 15 East, 530 (13 R. R. 519); *Smith v. Compton*, 3 B. & Ad. 189.

[682] TINDAL, Ch. J. — I see no reason to alter the opinion I expressed the other day,<sup>1</sup> that the generality of the covenant in law contained in the word “demise” is restrained by the express covenant for quiet enjoyment. The rule is laid down with great generality in *Nokes's Case* as reported by Lord COKE, and I must infer that he is correct in describing that rule as laid down by the whole Court, since he says affirmatively that it was so held by POPHAM, Ch. J., and *totam curiam*, and Croke, after mentioning POPHAM, is merely silent as to the rest of the Court. It has been ingeniously argued that in the word “demise” [\* 683] two distinct covenants are implied: one for title, \* the

<sup>1</sup> The case had been argued on a former day by Bere for Ogle, who was absent and judgment was given for the defendants; but the Court this day consented, as an indulgence, to hear Ogle himself.

No. 7.—*Line v. Stephenson*, 4 Bing. N. C. 683, 684.

other for quiet enjoyment. I am not prepared to say that such is not the natural effect of the word "demise;" but there is no authority for saying that an express covenant on one point does not qualify the whole effect of the word. *Fraser v. Skry* and *Norman v. Foster* only show that the word "demise" implies a power to grant; and that where there are two express covenants, one that the lessor has power to grant, the other that the lessee shall enjoy without interruption from any claiming under the lessor, the generality of the first is not qualified by the second; but I see no reason why, if the covenant implied by the word "demise" be divided into two parts, a subsequent express covenant for quiet enjoyment should not apply to the whole.

PARK, J.—The rule in *Noke's Case* has been acted on ever since; and Lord COKE's report must be taken to be correct, as he was then Attorney-General, and Croke was not a judge till twenty-five years after.

There is nothing in *Norman v. Foster* incompatible with the proposition that the subsequent express covenant controls the entire effect of the word "demise."

VAUGHAN, J.—I am of the same opinion. It would be impossible to give judgment for the plaintiff without impugning *Noke's Case*, and renouncing the rule that an express covenant controls a covenant in law. In *Merrill v. Frame*, the Court said that the argument which has been urged to-day would make *expressum* and *tacitum* mean the same thing.

COLTMAN, J.—There is a great difference between the covenant implied in the word "demise," and an express covenant for good title. In *Gainsford v. Griffith*, 1 Saund. 59, *Hesse v. Stevenson*, 3 Bos. & P. 565, *Burton v. Fitzgerald*, 15 East, 530 (13 R. R. 159), and *Smith v. Compton*, 3 B. & Ad. 189, the covenant for title was express, and in *Norman v. \*Foster*, HALE, Ch. [\*684] J., is speaking of two express covenants. It has been urged, indeed, that the covenant for title might have been pleaded as an express covenant here; but that is confounding a rule of evidence with a rule of construction. It would be dangerous to unsettle the rule in *Noke's Case*, which has never been judicially questioned; and I cannot distinguish the present case from *Merrill v. Frame*. There the word "demise" was followed by a covenant for quiet enjoyment, of which covenant there had been no breach, because the party who entered on the lessee did not claim under the

No. 7.—**Line v. Stephenson, 5 Bing. N. C. 183, 184.**

lessor: the question, therefore, was whether the implied covenant contained in the word "demise" was not qualified by the express covenant for quiet enjoyment. The Court held that it was; and therefore our judgment must be for the defendants.

*Judgment for the defendants.*

## (IN THE EXCHEQUER CHAMBER.)

5 Bing. N. C. 183-186.

The case having been brought up, on error, to the Exchequer Chamber:—

[183] Ogle now for the plaintiff contended, as before, that in the word "demise" two distinct covenants are implied,—  
[\* 184] \* one for title, and the other for quiet enjoyment; that the two are not synonymous: per Lord ELLENBOROUGH, Ch. J., in *Howell v. Richards*, 11 East, 642 (11 R. R. 287), and HALE, Ch. J., in *Norman v. Foster*, 1 Mod. 101; per LITTLEDALE, J., in *Burnett v. Lynch*, 5 B. & C. 609 (29 R. R. 343); *Fraser v. Skey*, 2 Chitty, 646, Bac. Abr. Covt. B., Com. Dig. Covt. A. 4; and that though an express extinguishes an implied covenant, yet that the express covenant here only extinguished the particular implied covenant to which it related, namely, the covenant for quiet enjoyment, leaving the implied covenant for title in full force. [Lord ABINGER, C. B.—Does not an express covenant as to one branch of the covenant implied by the word "demise" exclude the other? *Expressio unius est exclusio alterius*. PARKE, B.—Would it not be absurd to hold that the lessee meant to covenant absolutely for title by the general word "demise," when he afterwards expressly confines his covenant to the acts of those who claim under him? See *Nokes's Case*, 4 Co. Rep. 80 b. LITTLEDALE, J.—According to your argument, it would be a good breach if the plaintiff were evicted by a party who had no title at all.] The covenant for title and the covenant for quiet enjoyment are so essentially distinct, that a lessee might, before entry, recover nominal damages for a want of title in his lessee, and, after entry, actual damages upon an eviction. [ALDERSON, B.—The whole fallacy is in assuming that upon this indenture two covenants are to be implied from the word "demise;" it is true that the word if it stands alone raises a covenant, of which either want of title or eviction would be a breach; but when it is accompanied with an express covenant against the

Nos. 6, 7.—*Hare v. Horton; Line v. Stephenson.*—Notes.

acts of persons claiming under the lessor, it is confined to the breach by eviction.] But without actual eviction a lessee may \* incur serious loss from a want of title in his lessor, [\* 185] as by effecting extensive improvements upon the faith of a duration of interest which he has been led to rely on, and discovers, too late, the lessor is unable to secure to him: that could not have been the intention of the parties; and in order to give effect to such intention, the Courts have often, from an express covenant, raised an implied one, where, without such implication, the express covenant would be fruitless; as in *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487 (21 R. R. 367); *Webb v. Plummer*, 2 B. & Ald. 746 (21 R. R. 479); and *Randall v. Lynch*, 12 East, 179 (11 R. R. 340). The plaintiff here might have set out the deed according to its legal effect, and then it would have appeared on the declaration as if there had been an express covenant for title: in such case it would have been unnecessary to allege an eviction. In *Holder v. Taylor*, Hob. 12, it was held that where the lessor has no title, a lessee may sue for a breach of the covenant implied in the word "demise," notwithstanding he has never been evicted; and the language of the Court at the end of the case, "but if it were an express covenant for quiet enjoyment, there perhaps it were otherwise," is nowise inconsistent with what the plaintiff now contends. The covenant for title, whether express or implied, may be broken by defect of title, and without eviction; the covenant for quiet enjoyment can only be broken by eviction; but there is nothing in the case of *Holder v. Taylor* which leads to the inference that an express covenant for quiet enjoyment extinguishes an implied covenant for title.

Lord DENMAN, Ch. J.—We are all satisfied that the Court of Common Pleas is right, and that this case could not have been decided otherwise, without violating the first principles of the construction of deeds, as established \* by *Nokes's Case*, and recognised in *Merrill v. Frame*, 4 Taunt. 329 (13 R. R. 612). It is true that the word "demise" does imply a covenant for title, but only when there is no express covenant inconsistent with such a construction. *Judgment affirmed.*

## ENGLISH NOTES.

Where there were mutual stipulations in an agreement, and each of the parties, in consideration of the stipulations in the agreement, entered

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Nos. 6, 7. — *Hare v. Horton; Line v. Stephenson.* — Notes.

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into an express covenant to pay or perform certain of the stipulations, it was held that the stipulations of the agreement did not raise an implied covenant to perform the stipulations not expressly covenanted. *Aspdin v. Austin* (1844), 5 Q. B. 671, 13 L. J. Q. B. 155, 8 Jur. 355, D. & M. 515; *Dunn v. Sayles* (1844), 5 Q. B. 685, 13 L. J. Q. B. 159, 8 Jur. 358. Lord DENMAN, Ch. J., in delivering the judgment of the Court in the former of these cases said (5 Q. B. 684): “Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.”

A case which gave rise to some difference of opinion in the Court of Appeal was *Brace v. Culder* (1895), 1895, 2 Q. B. 253, 64 L. J. Q. B. 582, 72 L. T. 829, where four persons (the defendants) carrying on business in partnership agreed with the plaintiff to employ him as their manager for two years. The agreement provided that the defendants should be at liberty to terminate the agreement at any time during the two years on giving the plaintiff one month’s notice, but should in such case pay the plaintiff a sum equivalent to the salary he would have received, if he had been retained as manager for the full two years. Before the expiry of the two years the defendants dissolved partnership, two of them retiring from business, and the other two continuing to carry on the business. These two offered to continue the plaintiff in his employment, but he refused. LOPES, L. J., and RIGBY, L. J., held that the plaintiff was entitled to judgment in the action, on the ground that the dissolution of partnership was a wrongful dismissal. But they held that he was only entitled to nominal damages, as he might have continued in the service of the remaining partners on the same terms. Lord ESHER, M. R., however, held that there was no contract by the defendants that they would carry on the business for the period of two years, and that there was no wrongful dismissal.

#### AMERICAN NOTES.

The maxims at the foundation of this Rule have been uniformly recognized in this country, but more in respect to statutory interpretation than in respect to deeds or contracts.

Mr. Wood and Mr. Taylor (Landlord and Tenant) cite *Line v. Stephenson* to the doctrine of the Rule, but substantiate it only by English cases.

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No. 8.—*Rooke v. Lord Kensington*, 25 L. J. Ch. 795, 796.—Rule.

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No. 8.—ROOKE *v.* LORD KENSINGTON.

(1856.)

RULE.

WHERE, after an enumeration of particulars, there is a sweeping clause comprising all other things under a general description, the scope of such a clause is restricted to things within the description *of the same kind* with the particulars enumerated.

**Rooke v. Lord Kensington.**

25 L. J. Ch. 795-801 (s. c. 2 K. & J. 753).

*Conveyance. — General Words. — Ejusdem generis.*

[795]

By a mortgage, after reciting that the mortgagor was seised of or entitled [796] to the messuages, lands, hereditaments, and premises thereafter described, certain messuages, lands, hereditaments, and premises at K., in the county of M., were mortgaged by a particular description, and by reference to schedules; and after the description came the following general words: “And all other the lands, tenements, and hereditaments (if any) in the county of M. aforesaid, whereof or whereto the said (mortgagor) is seised or entitled for an estate of inheritance.” At the date of the mortgage the mortgagor was seised in fee of a manor at K., in the county of M. The Court, having no power under the circumstances to make a decree, expressed an opinion that the manor was not comprised in the mortgage.

In 1802 Lord Kensington, being entitled to the manor of Earl’s Court in Kensington, and to certain land and house property in the parish of Kensington (which last-mentioned property is hereafter called “the Kensington estate”), mortgaged the manor, the Kensington estate, and other property to Lord Beauchamp.

In 1807 Lord Beauchamp released the manor from his mortgage, and reconveyed it to Lord Kensington.

By deeds, dated in November, 1812, the mortgage of the Kensington estate was transferred to the Globe Assurance Company, and by deeds, dated the 23rd and 24th of September, 1824, transferred by them to Marjoribanks and others for securing £30,000; and by other deeds, dated in 1825 and 1827, the Kensington estate was charged with the payment of the further sums of £5000 and £3000 to Marjoribanks and others.

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No. 8.—**Rooke v. Lord Kensington**, 25 L. J. Ch. 796, 797.

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By indentures of lease and release, dated the 27th and 28th of March, 1828, Lord Kensington mortgaged the Kensington estate to Garrard. This suit was occasioned by the introduction of some general words, hereafter set forth, after the description of the parcels conveyed.

The deed of release of the 28th of March was made between Lord Kensington of the one part and Garrard of the other part; and it recited that Lord Kensington was seised of or entitled to the mes-suages, lands, hereditaments, and premises thereafter described, or intended to be thereby conveyed, with their appurtenances, in fee simple, subject to the mortgage and further charges. Lord Kensington then, by the witnessing part, released the Kensington estate by a particular description, and by reference to schedules of particulars and plans therein contained and annexed thereto, and also contained in and annexed to the deeds of 1812. After this description were these general words: "And all other the hereditaments and premises comprised in the hereinbefore-mentioned mortgage of the 23rd of September, 1824, and all other the lands, tenements, and hereditaments, if any, in the county of Middlesex aforesaid, whereof or whereto the said Lord Kensington is seised or entitled for an estate of inheritance."

The first question in the suit, upon which all the others turned, was, whether the manor passed under the general words in the release.

This question became of great importance from the circumstance that Lord Kensington had purchased, and had conveyed to him, a very large property at Brompton, which was copyhold of the manor of Earl's Court, and which is hereafter called "the Brompton estate," and mortgaged it, as freehold, to the extent of £140,000.

On the supposition that the manor had passed by Garrard's mortgage and the settlement, the mortgagees of the Brompton estate might lose their security altogether, or have only a copyhold instead of a freehold interest.

The bill was filed by one of the mortgagees of the Brompton estate, and prayed, among other things, that it might be declared

that the Brompton estate was not comprised in the set-  
[\* 797] tlement, which, in \*effect, was the same thing as a  
declaration that the manor was not comprised in Gar-  
rard's mortgage.

No. 8.—*Rooke v. Lord Kensington*, 25 L. J. Ch. 797, 798.

Mr. Willecock and Mr. Shapter, for the plaintiff.

Mr. Rolt and Mr. B. L. Chapman, for the mortgagees in the same interest as the plaintiff.

Mr. Selwyn and Mr. Eddis, for parties claiming under the settlement, who contended that it passed by Garrard's mortgage and the settlement.

Mr. W. M. James, Mr. Freeling, Mr. Cairns, and Mr. Bedwell, for other parties.

The following cases were cited:—

*The Marquis of Exeter v. The Marchioness of Exeter*, 3 Myl. & Cr. 321, 7 L. J. (N. S.) Ch. 240; *Moseley v. Motteux*, 10 M. & W. 533, 12 L. J. Ex. 136; *Moore v. Magrath*, Cowp. 9; *Doe d. Meyrick v. Meyrick*, 2 Cr. & J. 222, 2 Tyrw. 178, 1 L. J. (N. S.) Ex. 73; *Walsh v. Trevanion*, 15 Q. B. 733, 16 Sim. 178, 19 L. J. Q. B. 458; *Lady Langdale v. Briggs*, Weekly Rep. 1855-56, 703; *Shep. Touch*. 91, 247.

July 24. Wood, V. C. [after observations which applied only to the narrow terms in which the power of making a binding declaration of right was conferred on the Court by the Chancery Procedure Act of 1852, now superseded by the wider provision of the rules of Court under the Judicature Acts (Ord. 25, R. 5), and also discussing the question raised as to the plaintiff's equity to have the settlement reformed, on the supposition that the manor had passed by Garrard's mortgage, continued as follows:] I have gone all along on the assumption that these estates did pass by the mortgage deeds, but it seems to me very plain that at law the estates did not pass. I am prohibited from sending a case for the opinion of a Court of law, and I must therefore decide the case either by myself or with the assistance of a Judge of a common-law Court; and, if I thought there was a sufficient degree of doubt on the subject, that would be the course I should have to take in order to arrive at this preliminary question, as to whether the estates did or did not pass by these deeds. Now, looking to the deeds themselves, the mortgage deed stands thus: Lord Kensington had two very distinct properties. After the transaction of 1807 he had a manor with only manorial rights, that is, with only his rights as lord in the fee simple, subject to the large copyhold interest, which was conveyed to and vested in him by Lord Beauchamp's conveyance in 1807, and other property which was built on, and was subject to the mortgage of 1802, and

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further charges. He afterwards wishes to make a further mortgage of that property to Mr. Garrard, and the intent in the recital is this: it is recited that Lord Kensington was seised of or entitled to the messuages, lands, hereditaments, and premises thereafter described, or intended to be thereby conveyed, with their appurtenances, in fee simple, subject to the three mortgages thereof made by three certain indentures; that is the first recital, and is a plain and distinct recital of intention, that what he intended to convey was that which was subject to these several mortgages. Then, in the conveyance, he conveys all comprised in that mortgage of 1812, “and all other the lands, tenements, and hereditaments (if any) in the county of Middlesex aforesaid,

[\* 799] whereof or whereto the said Lord Kensington \* is seised or entitled for an estate of inheritance.” Well, now, it is true that the Courts have held, and the authorities are very numerous on this subject, that you cannot control clear words of conveyance by the words of recital. That is one canon, undoubtedly.

But, then, those words “clear words of conveyance” are subject to interpretation, and the exception will be found to be always that large and general words are not within that description of “clear words of conveyance” which cannot be controlled by the recital. Wherever you find a clear description of a particular property, notwithstanding a contradictory recital, you hold most strongly against the grantor upon his own deed; and there being a doubt whether the recital or the conveyance is wrong, the two being plainly and clearly contradictory, you hold that the operative part is to stand, notwithstanding the recital would lead you to a contrary conclusion. But where there are large and general words amply sufficient to cover everything,—in releases, for instance, which is the commonest case,—it has been long settled that the recitals clearly bind down the effect of those general words; but as an illustration of the rule, I apprehend that, if in that case the recital expressed an intention to release certain things, and the releasing part did not merely release in general terms, but released a particular debt or action not comprised in the recital that could not be limited or controlled by the recital, though the general words may be so controlled. In the case of *Alexander v. Crosbie*, 1 Ll. & G. 145, the question that arose was, whether there was a sufficiently clear recital that the property which was afterwards held to pass was to be excepted, for the

No. 8.—*Rooke v. Lord Kensington*, 25 L. J. Ch. 799.

recital was (in a marriage settlement), that the settlor intended to settle and convey all his estate except the lands of Ballyhenry and its sub-denominations; but in the operative part there was a conveyance by name of a property called Killahan, which was a sub-denomination of Ballyhenry. Now the question was, as he clearly expressed his intention to convey all the property except the sub-denominations of Ballyhenry, and then conveyed a property which was a sub-denomination of Ballyhenry, which of the two was to stand? Lord ST. LEONARDS says, "Although I have not the slightest doubt on this question, I thought it right to hear the arguments of all the counsel. As to the authority of a Court of equity to reform the settlement, nobody can dispute its power to correct a mistake," and so on. The Court is always tender in varying a settlement where the effect will be to defeat vested rights, or where it is sought to do so on mere parol evidence. In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance, or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established by parol evidence. Then he says, "The evidence goes to establish the fact that Killahan was considered a sub-denomination of Ballyhenry, and I must take that as a fact established. No attempt has been made to prove the contrary. This, then, leaves the case open to the weight to be given to that fact. The question for me now to decide is, whether, on the face of the settlement of 1815, there is sufficient, with the knowledge of this fact, to enable me to strike that denomination out of the settlement." Then he gives the recital, and he says, "Nothing can be more express, I admit. The manner in which the intention is carried into execution is this: in consideration of the fortune of the lady and of the said intended marriage, the father and the son do not convey all the estates by a general description, but take upon themselves to describe the several estates. It is not a general conveyance of 'all the estates, save and except Ballymalis and Ballyhenry,' but a conveyance of the several denominations by name, including Killahan. The question then is, Was Killahan inserted among the others by mistake?" Then comes the part I particularly refer to: "I have here to deal with the case of a conveyance, not by a general description, but where the parties

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give a description of the exact portions they intend to convey," clearly drawing a distinction between the conveyance by [\* 800] \* general description and the conveyance of a particular property by a particular name, in which case the recital cannot control the nominal description. He says, "I must sacrifice either the first or the second part of the deed: if there are two parts of a deed inconsistent with each other, I must sacrifice one; but can I have any doubt in sacrificing the general description in the first part in favour of that in the latter part, in which there is a clear, defined, and expressed intention?" So that he considered there that he would have been at liberty, as appears from that decision, had the conveyance been by general description and general words, to control the operation of those general words by the previous recital; but that where there was a clear and express description, as there was in that case, he was not at liberty so to control it by the recital. Then the next remark upon the case is, it is not only a general description, but it is a general description of a character which implies much more manifestly than a mere ordinary sweeping general description, that it is intended simply to do what Lord MANSFIELD, in *Moore v. Magrath*, considered to have been the function of such a description, namely, to sweep in anything *eiusdem generis* into the mass of the property which has been intended rigorously to be conveyed by a map and perfect and complete description; because the expression in it is not only "all other the lands, tenements, and hereditaments in the county of Middlesex," the case before Lord MANSFIELD being, "all other the property in the kingdom of Ireland," but it is here, "all other the lands, tenements, and hereditaments (if any) in the county of Middlesex." How can it be supposed that the intent of any of the parties can be, upon that instrument, to sweep in a manor with large manorial rights outstanding? The manor was nothing *eiusdem generis* with what had been conveyed, because everybody acquainted with conveyancing knows that manors, where it is the intent, are conveyed by a specific description. Precedence is given to manors. "Manors, lands, tenements, and hereditaments" is the common form in which all these conveyances run; and where, as in this case, the conveyance is this, "the messuages, lands, tenements, and hereditaments hereinafter described and intended to be conveyed subject to a mortgage thereof," and then a description of messuages, lands, tenements, and heredita-

No. 8.—*Rooke v. Lord Kensington*, 25 L. J. Ch. 800.—Notes.

ments, and then a conveyance of “all other the lands, tenements, and hereditaments (if any) in the county of Middlesex aforesaid whereof or whereto the said Lord Kensington deceased is seised or entitled for an estate of inheritance,” I think the clear intent and purport must be held to be simply a sweeping in of other property *eiusdem generis* with the property which had been so conveyed, if any there should be; certainly not to include a copyhold property and manorial rights in property of a totally different character from anything attempted to be conveyed or specified throughout the deed.

I am bound to say, that in *Moore v. Magrath* the decision did not rest on that, but it rested on there being no declaration of uses, which made the case very plain, and therefore I can only treat it as a *d'ecum* of Lord MANSFIELD. So, again, in the case of *Walsh v. Trevanion*, the Court had less difficulty in getting rid of the words than exists here, because there was another possible interpretation which might be given to the words without their being held only to sweep in that which existed *eiusdem generis*; but it seems to me, on looking to the established doctrine on releases, looking to the authorities which simply say you cannot control clear conveying words by the operation of the recital, looking to the observation made by Sir Edward Sugden, distinguishing those clear words of description by a name from a mere general description, I am bound to hold that in reality none of this property was comprised in this particular mortgage, and therefore on that account, and that alone, the settlement does not contain any portion of that property. . . .

## ENGLISH NOTES.

This principle is frequently applied in the interpretation of an Act of Parliament. See, for instance, *Sandiman v. Breach* (1827), 7 B. & C. 96, 31 R. R. 169; *Reg. v. Nevill* (1846), 8 Q. B. 452; *East London Waterworks Co. v. Mile End Overseers* (1851), 17 Q. B. 512; *s. c. nom. Reg. v. East London Waterworks*, 21 L. J. M. C. 49.

The principle of *eiusdem generis* is not applicable where the things previously enumerated cannot be classed in a common genus. See per BYLES, J., in *Reg. v. Payne* (1866), L. R. 1 C. C. R. 27, 35 L. J. M. C. 170. So where it was enacted that a person who with intent to facilitate the escape of a prisoner should convey into the prison any mask dress, disguise, letter or any other article or thing, was guilty of

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No. 9.—**Lord Glenorchy v. Bosville, Cas. Temp. Talbot, 3.—Rule.**

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felony, it was held that a crowbar was an article or thing within the section. *Ibid.*

## AMERICAN NOTES.

The last note is applicable to this case.

No. 9.—**LORD GLENORCHY v. BOSVILLE.**

(1733.)

## RULE.

WHERE an instrument directs the execution of another instrument, describing the object in terms, which if inserted *verbātīm* in the latter instrument would have a certain technical meaning, that meaning is not necessarily the intention of the direction; and it is to be considered, having regard to the whole scope of the former instrument, how the intention is to be carried out by the use of more careful and accurate language in the latter.

**Lord Glenorchy v. Bosville.**

Cas. Temp. Talbot, 3-20 (1 White &amp; Tudor, 1).

*Executory Trust. — How executed.*

[3] A. devises lands to his sister B. and C. and their heirs and assigns, upon trust, that until his granddaughter D. should marry or die, to receive the profits, and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies. After payment thereof, in trust for the said D., and upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said B., then to convey, with all convenient speed, after such marriage, to the use of the said D. for life, *sans* waste, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; and upon further trust, that if the said D. die unmarried, then to the use of B. for life; remainder to the son of his other granddaughter E. in tail; remainder to the defendant C.; remainder to his first and other sons; remainder to A.'s right heirs; and upon further trust, that if D. marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of D. for life, then to trustees to preserve contingent remainders: remainder to her first and every other son, being a Protestant, with remainders over; and as to the other moiety, to the son

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of his daughter E. in like manner. A. dies, D. attains her full age; and upon a treaty of marriage with F. applies to B. and C. for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body: B. executes such conveyance, but C. refuses; D. suffers a recovery of the whole to the use of herself in fee, and then marries F., who made a considerable settlement upon her; she covenants to settle her estate upon husband and wife; remainder to first, &c., sons in tail: remainder to survivor of husband and wife in fee. They bring a bill to compel C. to convey, &c., decreed (not an estate tail to D.) but an estate for life *sans waste, ut supra*, as being the intent of A. upon the will with remainders over in strict settlement.

Sir Thomas Pershall devises all his real estate to his sister Anne Pershall and Robert Bosville, and their heirs and assigns, upon trust, that till his granddaughter Arabella \* Pershall [\*4] marry or die, to receive the rents and profits thereof, and out of it to pay her £100 a year for her maintenance; and as to the residue, to pay his debts and legacies; and after the payment thereof, then in trust for his said granddaughter; and upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one, or upwards; or if under the age of twenty-one, and such marriage be with the consent of her aunt, the said Anne Pershall; then to convey the said estate with all convenient speed after such marriage, to the use of the said Arabella for life, without impeachment of waste, voluntary waste in houses excepted; remainder, after her death, to her husband for life; remainder to the issue of her body, with several remainders over; and upon further trust, that if the said Arabella Pershall die unmarried, then to the use of the said Anne Pershall for life; remainder to the son of his other granddaughter Frances Ireland in tail; remainder to Mr. Bosville, the defendant, for life; remainder to his first and other sons; remainder to the testator's right heirs; and upon further trust, that if his granddaughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said Arabella for life, remainder to trustees to preserve contingent remainders; remainder to her first and every other son, being a Protestant, with several remainders over; and as to the other moiety, to his daughter Ireland's son, in like manner.

Sir Thomas Pershall died in the year 1722, and Mrs. [5] Arabella Pershall, in 1723, attained her full age: and upon a treaty of marriage in 1729, she applies to the trustees for a con-

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veyance of the estate to herself for life; remainder to her intended husband for life, remainder to the issue of her body; and such conveyance was executed by one of the trustees; but Mr. Bosville, the other trustee, who was also a remainder-man, refused to convey. However, she having by this conveyance a legal estate tail in one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730 married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her; and as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life; remainder to the first and every other son of the marriage in tail male; and upon failure of such issue, to the survivor of the said husband and wife in fee.

The bill was to have a conveyance of the moiety of the said trust estate from Mr. Bosville, to such uses as are limited by her in the said covenant. And the principal question was, whether under the said will the Lady Glenorchy was tenant for life or in tail? Upon which two other questions arose, viz., first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail? secondly, if so, whether the Court will make any difference between a legal title and a trust estate executory?

LORD CHANCELLOR (KING).—I should upon the first question make no difficulty of determining it an estate tail, had this been an immediate devise; but when you apply to this Court for the carrying a trust estate into execution, the doubt is, whether we shall not vary from the rules of law to follow the testator's intent? which will also bring on another question, what is the testator's intent in the present case?

[6] Upon the second question, it was argued for the plaintiffs, that the Lady Glenorchy was, under this will, entitled to an estate tail in equity: for this Court puts the same construction upon limitations of trusts in equity as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the Earl of Nottingham in the *Duke of Norfolk's Case* (Select Cas. in Ch. 1); and the authority of *Baile v. Coleman*, 2 Vern. 670, s. c. 1 P. Wms. 142, 1 Ves. 151, where a trust to one for life, remainder to the heirs male of his body, is held an estate tail, has never yet been questioned. So it is held in *Legat and Scudell's Case*, 2 Vern. 551 (but more fully reported

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in Abr. Eq. Ca. 394, s. c. 1 P. Wms. 87), where money was given to be laid out in land to one for life, and after his decease, to his heirs male, and the heirs male of the body of every such heir male, severally and successively one after another; and a case being made for the opinion of the Judges, as of a legal estate, they certified it to be an estate tail. So in the case of *Bugshaw v. Downes*, or *Bugshaw v. Spencer*, at the Rolls, Hil. 6 Geo. II. (2 Atk. 246, 570), an executory trust was directed to the Judges for their opinion as a legal estate. Upon the same reason do *cestui que trusts* levy fines and suffer recoveries, which are held good in this Court. Indeed, in marriage articles, if they covenant to settle to the husband for life, remainder to the heirs of their two bodies, this Court will decree a conveyance in strict settlement, if any of the parties apply here; because the children are looked upon as purchasers: but in a will it is otherwise; they take through the bounty of the testator, and in such words as he gives it.

It was further insisted for the plaintiffs, that the words "issue of her body" would make a difference from all other cases; for in the statute *de donis*, which created entails, it is said to be a proper word for that purpose, and is used no less than ten times in that statute; for this the authority of *King v. Melling*, 1 Vent. 214, 225, and the reason there given cannot be contested; which is also an authority in the principal case: for there [7] it is held, that to one for life, with a power to make a jointure, is much stronger to show the intent of the testator, than the words "without impeachment of waste." To A. for life, remainder to the issue of her body, and for want of such issue, remainder over, was held an estate tail in the Court of Exchequer, in the case of *Williams v. Tompson*, about three or four years ago. Anders. 86. To one for life, remainder to the children of his body, is an entail. So in *Wild's Case*, 6 Co. Rep. 16, and *Sweetapple v. Bindon*, 2 Vern. 536.

It was further argued, that if the remainder in this case to the issue be construed to be words of purchase, they must be attended with the greatest absurdity; for in what manner can the issue take? All the sons, daughters, and grandchildren are issue; and if they take as purchasers, they must be joint tenants, or tenants in common, and that for life only. *Cook v. Cook*, 2 Vern. 545. Which construction can never be agreeable to the testator's intent; and whatever estate was given in the first part of the will, yet the

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words "and for want of such issue, then," &c., will give the plaintiff an estate tail, according to the cases of *Langley v. Baltwyn*, and *Shaw v. Weigh*, Eq. Cas. Abr. 184, pl. 28, 29. It was also further urged, that from the face of the whole will, and by comparing this clause with the other, it appears that the testator intended the plaintiff, the Lady Glenorchy, should take an estate tail; and that the several clauses in a will are to be taken together, and make but one conveyance; and that it was a proper argument to prove the intention of the party from the different penning of the several clauses. The person who drew the will knew how to convey, either by words of limitation or purchase, where there was occasion for it; for, where he limits the estate to Mrs. Ireland, it is in strict settlement by proper words of purchase; and so where he limits it to the Lady Glenorchy, in case she had married a Papist. But further, to show he well understood

the doctrine of conveyances, when he limits by words of [3] purchase to sons not in *esse*, he has put in trustees, to preserve contingent remainders; which he would certainly have done in this case, had he intended the Lady Glenorchy an estate for life only.

For the defendant it was argued, that though, in the construction of wills in this Court, uses and trusts are to be governed by the same rules as legal estates, and that there is but little difference between uses and trusts executed and legal estates, yet trusts executory are by no means under the same consideration. In the cases of *Legat v. Sewell* and *Baile v. Coleman* the Judges were divided in their opinions; and since that time there is an express authority for the defendant. In the case of *Papillon v. Voyce*, Hil. 5 Geo. II. (2 P. Wms. 471); so likewise in the case of the *Attorney General v. Young*, in the Court of Exchequer; and the case of *Leonard v. Earl of Sussex*, 2 Vern. 526, as also in the case of *Brampton v. Kinaston*, heard at the Rolls in June, 1728, where an estate was given to be settled upon his grandchild for her life; remainder to the issue of her body: and when she applied to have an estate tail conveyed to her, she was decreed an estate for life only. And to show that this Court is not tied up to the rules of law in cases of executory trusts, the case of the *Earl of Stamford v. Sir John Hobart* (cited in *Bagshaw v. Spencer*, 1 Ves. Sen. 149, and in *Fearne Cont. Rem.*), concerning Serjeant Maynard's will, was cited, where an estate was given to

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trustees, to convey one moiety to Sir John Hobart for ninety-nine years, in case he should so long live, with several remaindeis over; and this Court decreed the Master should settle the conveyance according to the letter of the will; but upon exceptions to the Master's report, November 19, 1709, it was ordered, that proper estates should be made to support the remainders, that the testator's intent might not be frustrated; and this resolution was affirmed in the House of Lords (3 Bro. P. C., Toml. ed., 31). So in all matters executory, this Court endeavours to find the intent of the parties, and lets it prevail against the rules of law. In marriage settlements it was never doubted but that this Court would carry any words into strict settlement, if the [9] intent of the parties was such; and so held in the case of *West v. Erisey*, in the House of Lords, 1 Bro. P. C. 225, Toml. ed., and in that of *Trevor v. Trevor*, Abr. Eq. Ca. 387, 5 Bro. P. C. 122, Toml. ed.; and the same rules will prevail in all cases executory, whether wills or articles. Besides, the present case is very much like that of marriage articles: the testator had all along the marriage of his granddaughter in view, and intended this will as no more than heads or directions for the trustees in what manner he would have it settled; and so it remains to be carried into execution by the aid of this Court.

Then as to the word "issue," it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in *Wylde's Case*, 6 Co. Rep. 16, where "to one and his children" is held to be an estate tail; yet, had it been "to one for life, remainder to his children," there can be no doubt but that it had been a bare estate for life. And as to the objection, that the issue, if purchasers, are to take jointly and for life only, why shall it not be as in cases where the limitation is to the first and every other son? And wherever "heirs of the body" are held to be words of purchase, they are construed to the first and every other son.

To make an estate tail arise by implication upon the words "and for want of such issue," has been cited the case of *Langley v. Baldwyn*, 1 Eq. Cas. Abr. 185. But there is the case of *Bamfield v. Popham*, 2 Vern. 427, 449, for the defendant; so the case of *Loddington v. Kyme*, 3 Lev. 431, and that of *Burkhouse v. Wells*, 1 Eq. Cas. Abr. 184. Besides, it is a general rule, that where an estate is to be raised by implication, it must be a necessary and inevitable implication, and such as that the words can have no

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other construction whatsoever; and in the present case there is the word "issue" mentioned before; so that these last words must relate to the issue before mentioned: whereas in the case of *Langley v. Baldwin*, the limitation is to fix sons only; then come [10] the words, "and for want of issue;" which words could not have relation to anything before mentioned.

The case having come to be argued again before the Lord Chancellor TALBOT upon the same points that had been before the late LORD CHANCELLOR (KING),

It was insisted by the plaintiff's counsel, that the Lady Glenorchy's marrying a Protestant of the Church of England, at or after the age of twenty-one, or if under that age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent; which, when performed, would give her an estate tail. . . .

It was argued for the defendant by Mr. Attorney-General, Mr. Verney, and Mr. Fazakerly, that the Lady Glenorchy could take but an estate for life; and they took a difference between the present case, being of an executory trust, and those of *Cozens, Owen*, 29, and of *Cook v. Cook*, 2 Vern. 545, which were legal estates, and executed. . . .

Lord Chancellor TALBOT. — Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn; the testator having expressed himself variously in many if not in all of them. It is plain, that by the first part of this will he intended her but an estate for life till marriage; then comes the clause upon which the question depends. But before I give any opinion of that, I must observe, that the trustee has not done right; for nothing was to vest till after her marrying a Protestant: the trustee therefore, by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

But the great question is, What estate she shall take? And first, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only; so likewise of the remainder to the husband: but then come the words, "remainder to the issue of her body," upon which the

question arises: the word "issue" does *ex vi termini* comprehend all the issue; but sometimes a testator may not intend it in so large a sense, as where there are children alive,

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&c. That it may be a word of purchase is clear from the case of *Backhouse v. Wells*, and of limitation, by that of *King v. Melling*; but that it may be both in the same will, has not, nor can be, proved. The word "heirs" is naturally a word of limitation; and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will; but should the word "issue" be looked upon as both in the same will, what a confusion would it breed! for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, Whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase? If by purchase, they can take but for life, and so every issue of that issue will take for life; which will make a succession *ad infinitum*, a perpetuity of estate for life. This inconvenience was the reason of Lord HALE's opinion in *King and Melling's Case*, that the limitation there created an estate tail. It may be, the testator's intent is by this construction rendered a little precarious; but that is from the power of the law over men's estates, and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it will defeat the estate: no, the power shall be void. But there the power is annexed to the estate for life, which she took first; and therefore I am rather inclined to think it stronger than *King and Melling's Case*, where there was no mediate estate, as there is here to the husband; there, there was an immediate devise, here a mediate one: so the applying this power to the estate for life carries no incongruity with it. As the case of *King v. Melling* has never been shaken, and that of *Shaw v. Weigh*, or *Sparrow v. Shaw*, which went up to the House of Lords, was stronger, I do not think that Courts of equity ought to go otherwise than the Courts of law; and therefore am inclinable to think it an estate tail as it would be at law.

But there is another question, viz., How far in cases of [19] trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it, I think in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same, for there the testator does not suppose any other conveyance will

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be made: but in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner. The case of *Leonard v. The Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but being an executory trust, the Court decreed according to the intent as it was found expressed in the will, which must now govern our construction. And though all parties claiming under this will are volunteers, yet are they entitled to the aid of this Court to direct their trustees. I have already said what I should incline to, if this was an immediate devise; but as it is executory, and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in *King and Melling's Case*; and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, viz., to the Lady Glenorchy for life, remainder to her husband the Lord Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the case of *Earl of Stamford v. Sir John Hobart*, Dec. 19, 1709, it appeared, that for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the Act of Parliament to take effect, might have been avoided; and therefore the Lord COWPER did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the case of *Legat v. Sewell*, the words, if in a settlement, would have made an estate tail; and in that of *Baile v. Coleman* the execution was to be of the same estate he had in the trust, which in construction of law [20] was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon v. Voyce* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other.

And so decreed the Lady Glenorchy but an estate for life, with remainder, &c.

## ENGLISH NOTES.

The above case has been commonly regarded as the leading authority upon the distinction between an executory and an executed instrument. There is however a clear enunciation of the principle in the decree of Lord Chancellor COWPER in the earlier case of *Stamford v. Hobart* (1709), which was affirmed by the House of Lords in 1710. The decla-

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ration in the preamble to Lord COWPER's decreee is stated in the report in 3 Brown P. C. (Tomlin's ed.) p. 33, as follows : “That in matters executory, as in the case of articles, or a will, directing a conveyance, where the words of the articles or will were improper, or informal, that Court would not direct a conveyance, according to such improper or informal expressions in the articles or will, but would order the conveyance or settlement to be made in a proper and legal manner, so as might best answer the intent of the parties; and in this case, his Lordship conceived the true intent of the will to be that the estates should be secured, as far as the rules of law would admit, to the issue male of the respective devisees, before the cross-remainders should take place ; and that it was designed to be as strict a settlement as possible by law.”

To explain the word “executory” as used in regard to the principle expounded by these cases, an important observation is made by Lord ST. LEONARDS in advising the House of Lords in *Egerton v. Lord Brownlow* (1853), 4 H. L. Cas. 1. The case arose out of the will of the Earl of Bridgewater who by his will devised (subject to certain charges) large estates to trustees to make a settlement according to the limitations directed by the will. These limitations were drawn in the precise language of conveyancers with successive estates limited by way of use and uses to trustees to preserve contingent remainders. Then there was a proviso that certain of the limitations should become void if the persons to whom the estates were so limited did not acquire the title of Duke of Bridgewater. The effect of the decision of the majority was to hold that this was a condition which could not legally take effect. Lord ST. LEONARDS in advising the House incidentally explains the meaning of an executory trust, in the strict sense, which unquestionably this was not. He says (4 H. L. Cas. 210): “There is no colour belonging to the trust of an executory trust, properly so called — all trusts are in a sense executory, because a trust cannot be executed except by conveyance, and, therefore, there is something always to be done. But that is not the sense which a Court of equity puts upon the term ‘executory trust.’ A Court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer ? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates ?” He then shows clearly that the trusts of the will came under the latter class.

The test here mentioned by Lord ST. LEONARDS, — Has the testator

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been his own conveyancer?—has been frequently cited and applied since: for instance, by Lord CHELMSFORD in *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543, 561, 39 L. J. Ch. 505. In the same case Lord CAIRNS cited the decree of Lord COWPER in *Stamford v. Hobart*, above referred to. In *Sackville-West v. Holmesdale*, the testatrix had given her estates to trustees in trust to settle them “in a course of settlement to correspond, as far as practicable, with the limitations” of a certain barony recently granted by patent. The majority of the Lords held that the trust was executory, and directed a strict settlement following so far as consistently with that purpose the limitations of the patent. Had those limitations been followed literally the result would have been to create an estate tail in the next successor who might thus have disposed of the estate irrespective of the devolution of the peerage.

Another important observation relates to the distinction between the presumption as to the intention of an executory settlement when contained in marriage articles, or in a will. “Articles,” says Lord HARDWICKE, C., in *Blandford v. Marlborough*, 2 Atk. 545, “are considered as minutes only, and the settlement may afterwards explain more at large the meaning of the parties.” Sir WM. GRANT, M. R., in *Blackburn v. Stables* (1814), 2 Ves. & Be. 367, 369, 13 R. R. 120, 122, observes: “I know of no difference between an executory trust in marriage articles and in a will [*The Countess of Lincoln v. The Duke of Newcastle*, 12 Ves. 227 (4 R. R. 31)], except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption, that he means one quantity of interest rather than another, an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from anything in the will, that the testator did not mean to use the expressions, which he has employed, in their strict, proper, technical sense, the Court in decreeing such settlement as he has directed will depart from his words in order to execute his

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intention : but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense ; and have never said, that merely because the direction was for an entail, they would execute that by decreeing a strict settlement."

The same distinction is adverted to by Lord CAIRNS in *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543, at p. 572. Adverting to the case of marriage articles he says : " Words may be used which, technically construed, would imply that the issue of the marriage should be left to the chance of taking by descent an estate of inheritance vested in the parent ; yet so strong is the evidence, arising out of the occasion of the contract, of an intention to give to the issue a provision independent of their parents, that as a general rule, limitations will be introduced into the completed settlement, giving a life estate to the parent and estates by purchase to the issue. This is not because there is any rule of law applicable peculiarly to marriage articles, but because in such documents, *res ipsa loquitur*, the occasion itself testifies what the paramount object of the parties must have been."

## AMERICAN NOTES.

This case is the subject of a learned note by the American editors of White & Tudor's Leading Cases. It is there pointed out that the distinction between executed and executory trusts is well settled in this country in connection with the rule in *Shelley's Case*, and the American Courts have asserted the application of that rule in regard to executory trusts by causing the persons answering the description of takers to take as purchasers, and wherever the intention appears that the first taker should take only for life, the remaindermen would take as purchasers unless there is something in the instrument to change that construction. *Saunders v. Edwards*, 2 Jones Equity (Nor. Car.), 134. The distinction in question was established in New York in *Wood v. Burnham*, 6 Paige, 513; 26 Wendell, 9. At that time the rule in *Shelley's Case* was in force in that State, but Chancellor WALWORTH held, citing the principal case, that "the devise in this case to the executors being an executory and not an executed trust, or in the language of one of the English Chancellors, the testator having directed his executors to make conveyance of the estate to the *cestuis que* trust, instead of being his own conveyancer by vesting either a legal or equitable estate in his children and their heirs directly, it forms an exception to the rule in *Shelley's Case*, and this Court will direct the conveyance to be made in such a manner as to carry into effect the intention of the testator notwithstanding the rule in *Shelley's Case*." "The principle therefore must be considered as settled, that whenever there is an executory trust to be carried into effect by a conveyance from the trustees, if it is apparent from the instrument creating the trust that the testator or donor intended that the first taker should have a life estate only, and that his heirs should take the remainder in fee as purchasers, this Court will direct such a conveyance to be made as will most effectually carry into effect such inten-

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tion, so far as it can be done consistently with legal rules." To this effect, *Edmundson v. Dyson*, 2 Georgia, 307, citing the principal case; *Loving v. Hunter*, 8 Yerger (Tennessee), 4; *Garner v. Ex'r's of Garner*, 1 Desaussure (So. Car.), 437; *Horne v. Lyeth*, 4 Harris & Johnson (Maryland), 431; *Dennison v. Goehring*, 7 Penn. State, 175; 47 Am. Dec. 505; *Price v. Sisson*, 2 Beasley (New Jersey Eq.), 168; *Tillinghast v. Coggeshall*, 7 Rhode Island, 383, citing the principal case; *Locke v. Barbour*, 62 Indiana, 577; *Baker v. Scott*, 62 Illinois, 86; *Josetti v. McGregor*, 19 Maryland, 202. See also *Goodrich v. Lambert*, 10 Connecticut, 448; *King v. Beck*, 15 Ohio, 559; *Warners v. Mason*, 5 Muuford (Virginia), 242; *Swain v. Roscoe*, 3 Iredell Law (Nor. Car.), 200; *M'Graw v. Davenport*, 6 Porter (Alabama), 319.

"The doctrine of executory trusts finds one of its most striking applications in the mode of carrying into effect and enforcing marriage articles. Where such articles or agreements to settle are general in their terms, a Court of equity presumes that it was the intention of the parties to provide for the issue of the marriage, and will direct a settlement to be made which does provide for the children; and if the agreement contains technical terms, which in a fully executed trust would admit the operation of the rule in *Shelley's Case*, and thus render the limitation in favor of the children liable to be destroyed, the Court will order the settlement to be made in such a manner as to prevent the operation of that rule and the destruction of the limitations to the issue. This doctrine is applicable however only when the marriage articles are an agreement for a settlement, and not when the settlement has been completed. In the case of a will there is no presumption of an intention to provide for children; the provisions of the will itself are the only guide in construing its terms. If technical words are used, and are not modified or explained by the contract, it seems that the trusts, whether executory or not, must be construed in accordance with their technical sense. Still in the case of an executory trust created by a will, the intention so to modify the terms may be collected from slighter indications than would be sufficient in that of an executed trust.'" Mr. Pomeroy cites the principal case, and *Cushing v. Blake*, 30 New Jersey Equity, 689 (a remarkably exhaustive review of the authorities, including the principal case); *Neves v. Scott*, 9 Howard (U. S. Sup. Ct.), 196; *Carroll v. Renich*, 7 Smedes & Marshall (Mississippi), 798; *Berry v. Williamson*, 11 B. Monroe (Kentucky), 245; *Imlay v. Huntington*, 20 Connecticut, 146; *Riddle v. Cutter*, 49 Iowa, 547; *Petition of Angell*, 13 Rhode Island, 630.

With the general abrogation of the rule in *Shelley's Case* in this country, the necessity for the application of this distinction has disappeared to a large extent.

No. 10.—*Hall v. Cazenove*, 4 East, 477.No. 10.—**HALL v. CAZENOVE.**

(K. B. 1804.)

## RULE.

THE date of a deed, in the sense of the date when the instrument takes effect as a deed, is the date of delivery, and is therefore a matter extrinsic to the writing and provable by parol evidence.

**Hall v. Cazenove.**

4 East, 477-485 (7 R. R. 611).

*Deed.—Date.—Extrinsic Evidence.*

One may declare in covenant that the deed was indented, made, and [477] concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made, and concluded. Where a charter-party, dated 6th of February, but averred not to be executed till the 15th of March, contained a covenant by the owner that the ship should and would proceed from D., where she then lay, on or before the 12th of February, on her outward-bound voyage, and return, &c., and a covenant by the freighter that in consideration of everything above mentioned, &c., he would pay a certain freight for the voyage: the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant without averring that the ship sailed on or before the 12th of February; such covenant that the ship should sail on or before the 12th of February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it.

The plaintiff declared, that whereas by a charter-party or affreight, purporting to be indented, made, and concluded in London, on the 6th of February, 1801, between the plaintiff as owner of the ship *Argo*, then lying in the river Thames, and bound on a voyage to Demerara, on the one part, and the defendant and one J. B., of London, merchants, on the other part; but which charter-party was in fact first indented, made, and concluded after the said 6th of February, &c., and also after the 12th of the same Feb-

## No. 10.—Hall v. Cazenove, 4 East, 477, 478.

ruary, to wit, on the 15th of March, 1801, and not on the said 6th of February, or at any time before or on the said 12th of February in that year; and was also in fact sealed and delivered by the plaintiff and defendant only, and not by the said J. B.; one part of which the said charter-party sealed, &c., the plaintiff now brings here into Court, the date whereof is the said 6th of February, 1801; it was witnessed, that the said owner, for the considerations after mentioned, covenanted and agreed with the said freighters that the said ship should and would proceed from Deptford, where she then lay, on or before the 12th day of the said February to the port of rendezvous for the ships that were to join convoy for the West Indies, and proceed under convoy to Demerara; and on delivery of the cargo outwards, which was to be

within ten days after arrival, she should and would re-

[\*478] ceive on board from the agents of the freighters a full cargo, &c., and having received the same on board, should therewith proceed from thence, after the expiration of the lay days thereafter mentioned, to the place of rendezvous for the convoy for England, and having joined the fleet, should sail therewith for London, and there make true delivery of the cargo to the freighters, &c. And it was also in the said charter-party alleged that the said owner did thereby covenant and agree with the said freighters, that the said ship should and would proceed on her intended voyage on or before the day before mentioned. And the plaintiff, as such owner of the ship, covenanted with the freighters that the ship should lay at Demerara, for unloading the outward and loading the homeward cargo, sixty running days (ten for unloading, and the remaining fifty only to be reckoned from unloading), and the usual time for unloading on her return to London, &c.; in consideration whereof, and of everything therein above mentioned, the defendant covenanted and agreed that the said freighters should load, &c., in the port of Demerara within the time limited, and should pay the freight, &c., in two months after reporting at the custom-house at London. And the plaintiff thereby covenanted with the freighters that they might keep the ship on demurrage at Demerara twenty running days on the whole, on payment to the plaintiff of £10 a day for every day beyond the lay days before mentioned. The plaintiff then averred that the ship d'd. after the making of the said charter-party, viz on the 15th of March, in the year aforesaid, proceed from Deptford upon

No. 10.—*Hall v. Cazenove, 4 East, 478–480.*

the said voyage, under and upon the terms as by the charter-party, &c., to the port of rendezvous for the ships that were to join convoy in the West Indies with her outward-bound cargo, which had been shipped by the freighters, and afterwards proceeded under \*convoy to Demerara, where she arrived on the 29th of [\*479] May following. That she delivered her outward-bound cargo within two ten days after and received a full homeward cargo from the agents of the freighters, and lay at D. sixty running days for the purpose of unloading and reloading, and that the freighters kept the ship on demurrage at Demerara above the lay days in the charter-party mentioned, which demurrage amounted to £200. That the ship afterwards joined convoy, &c., and on the 27th of January, 1802, arrived at London with her homeward cargo, &c., and there ended the said voyage, and the freight, &c., amounted to £1888 6s.; and then the plaintiff averred that two months and upwards had elapsed from the time of reporting the ship at the custom-house; and that though he had performed, and been ready and willing to perform, everything in the charter-party contained on his part to be performed, and which on his part and behalf could possibly be performed, according to the tenor and effect, true intent and meaning, of the charter-party, yet the defendant did not, at the expiration of two months from such report as aforesaid of the ship's arrival, &c., or at any other time, pay to the plaintiff the said sums for freight, &c., and demurrage, but made default, &c.

The defendant, by his plea, craved oyer of the charter-party, which was in these words: This charter-party of affreightment, indented, made, and concluded in London this 6th day of February, 1801, between J. H. (the plaintiff), owner of the ship *Argo*, now lying in the river Thames, and bound on a voyage to Demerara, of the one part, and C. T. C. (the defendant) and J. B., &c., of the other part, witnesseth that the said owner, for the considerations hereinafter mentioned, doth covenant, &c., with the said freighters, &c., that the said ship shall and will proceed \*from Deptford, where she now lies, on or before the 12th [\*480] of this present February, to the port of rendezvous, &c., and proceed under convoy, &c., to Demerara, &c., and proceed from thence, &c., for London (as before set forth in the declaration); in witness whereof the parties have hereunto set their hands and seals the day and year first above written: and then the defendant

No. 10.—*Hall v. Cazenove, 4 East, 480, 481.*

demurred, and showed for causes that it is not alleged, nor does it appear by the declaration, that the said ship did proceed from Deptford on or before the 12th of the said February in the charter-party mentioned to the place of rendezvous, &c., nor that the charter-party was first indented, made, and concluded after the 6th of February, 1801. But that it appears by the charter-party that the same was indented, made, and concluded on the said 6th of February in the year aforesaid; and that the plaintiff is by law estopped from making the said allegation, &c. Joinder in demurrer.

Giles, in support of the demurrer, after observing that the allegation in the declaration was not that the charter-party was sealed and delivered after the date of it, which is the 6th of February, but the allegation was of the time when it was indented, made, and concluded, argued that the plaintiff was estopped from alleging that the charter party was indented, made, and concluded after the 6th of February, when it appears upon the face of it as stated to have been indented, made, and concluded on the 6th of February. And though it be competent to a party to aver that a deed was delivered after the date, yet he cannot make any allegation inconsistent with the deed. *Goddard's Case*, 2 Co. Rep. 4 b, Bro. Abr. Obligation, pl. 40, Departure, pl. 14. [Lord ELLENBOROUGH, Ch. J.—*Stone v. Bale*, 3 Lev. 348, is decisive to

[\* 481] show that a \* party may aver a delivery of a deed on another day than that on which it bears date.] The distinction taken is, that a party cannot aver a delivery on a day prior to the date. But if the plaintiff be not estopped from making the particular allegation in the declaration, as being equivalent to an averment of the day of delivery of the deed, then, 2ndly, the deed must be considered as delivered on the 15th of March, in which case it is void upon the face of it; because it appears from the whole scope of it that it was a condition precedent to the payment of freight, &c., that the ship should proceed from Deptford, where it is stated that she then (*i.e.* on the 6th of February) lay, on or before the 12th of February, to the port of rendezvous, &c., and proceed under convoy to Demerara. And the allegation that the deed was executed after the 12th will not supersede the necessity of alleging that a thing was done on the 12th, which by the terms of the deed is made a condition precedent. Co. Litt. 206.

Lawes, *contra*, was stopped by the Court.

No. 10.—*Hall v. Cazenove, 4 East, 481–483.*

Lord ELLENBOROUGH, Ch. J.—First, as to the objection that the party is estopped from saying that the deed was indented, made, and concluded on a different day from that on which it bears date, I see nothing inconsistent with the deed in such an allegation, any more than if he had alleged that it was sealed and delivered on a day subsequent. It is quite unimportant when it was indented, and equally so when it was made, by which may be understood when it was written. Then the only material word is “concluded,” and a deed can only be said to be concluded when it is delivered. The time of delivery is the important time when it takes its effect as a deed; and the case \* of *Stone v. Bule*, 3 Lev. [\* 482] 348, is in point to show that the delivery may be averred to be after the date. There is, therefore, no repugnancy in the allegation. Then, 2ndly, it is objected that the sailing on the 12th of February was a condition precedent, the performance of which was necessary to be alleged to entitle the plaintiff to recover. If it had been possible to have been performed at the time of the delivery, if the time itself had not then gone by, the inclination of my opinion at present is that it would have been a condition precedent. I do not, however, mean to give any opinion on that point. But here, when the deed was executed or concluded by the delivery, the stipulation, which was not impossible in its nature when the deed was first framed, had become impossible as between these parties from the time having passed. The stipulation, therefore, had then become wholly nugatory, and cannot be understood as having formed any part of the contract between the parties, without imputing to them the most manifest absurdity. Then the rest of the contract may take effect, which was prospective at the time when the deed was concluded.

GROSE, J., declared himself of the same opinion.

LAWRENCE, J.—Though the allegation here be not in exactly the same words as in *Goddard's Case*, yet it is the same in substance; and according to that case, though the deed appear on the face of it to have been made on one day, yet if in truth it were delivered on a subsequent day, that may be shown by averment: and there is no more inconsistency in the one case than in the other. Then as to the second objection, I doubt whether the sailing on \* or before the 12th of February be a condition precedent on the part of the plaintiff to his recovery: [\* 483] it is a covenant that the ship should or would, &c., prospectively.

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But taking it, as my Lord has said, to be a condition precedent in the terms of it, yet having become, by the lapse of time, altogether impossible when the deed was executed, it could form no part of the agreement between the parties. But in construing instruments we must look to the substance of them in order to discover the meaning of the parties; and looking at the substance of this charter-party it is not unlike the case of *Constable v. Cloberie*, Palm. 393, where the plaintiff covenanted in a charter-party that his ship should sail with the next wind upon a voyage to Cadiz; and the defendant covenanted that if the ship went the intended voyage and returned to the Downs, that the plaintiff should have so much for voyage. The defendant traversed that the ship sailed with the next wind; and upon demurrer the traverse was overruled, for the substance of the covenant was considered to be that the ship should perform the intended voyage, that being the primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour. And that this was shown by the covenant of the defendant, who was to pay so much for the freight; that is, for performing the voyage, and not merely for sailing with the next wind. So here the substance of the covenant is that the ship shall go to Demerara on freight and return again. I take this to be rather a case of mutual covenants than a condition precedent, and in that view the case of *Boone v. Eyre*, 1 H. Blac. 273 n. (2 R. R. 768), and see *Campbell v. Jones*, 6 T. R. 573 (3 R. [\* 484] R. 263), \* is material to be attended to. That was, where

the plaintiff had conveyed a plantation in the West Indies, with the negroes upon it, to the defendant, in consideration of an annuity to be paid him for his life; and covenanted that he had a good title to the land, and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. And the defendant covenanted that the plaintiff, well and truly performing all and every thing therein contained on his part to be performed, he (the defendant) would pay the annuity. The breach assigned was the non-payment of the annuity. The defendant pleaded that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey. But it was holden that these were mutual covenants, and that where mutual covenants go only to a part of the consideration on both sides, where a breach may be paid for in damages, there

No. 10.—*Hall v. Cazenove*, 4 East, 484, 485.—Notes.

the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. According to this case, therefore, it would not have been a condition precedent to the plaintiff's recovering on the covenant for freight even if it had been possible for the ship to have sailed on or before the 12th of February, and she had not done so. And if the voyage has been performed, and the profit of it gained by the defendant, there can be no foundation for saying that the defendant shall not pay the freight for it; and he may recover damages for the not sailing in time, if any have been occasioned by it.

LE BLANC, J.—The substance of the pleadings shows that the charter-party was executed after the day on which it bears date, which, by all the authorities, the defendant is not estopped from doing. Then as to the other objection, \* if the defendant sustained any damage by reason of the ship's not having sailed on the particular day, he may recover it by bringing his action on the covenant; but, at any rate, the objection does not go to the plaintiff's right of action as on the ground of a condition precedent.

*Judgment for the plaintiff.*

## ENGLISH NOTES.

In *Steele v. Mart* (1825), 4 B. & C. 272, 28 R. R. 256, a lease purported to have been made on the 25th of March, 1783, *habendum* to the lessee from the 25th of March now last past for thirty-five years. It appeared from an indorsement on the lease that it was executed on the 10th of May, 1783. It was held that the lease must be read as taking effect at the date of delivery; and, therefore, the term was to be taken as commencing on the 25th of March, 1783. It is clear from the opinions of the Court that the same result would have been arrived at whether the date had been shown by the indorsement, or by verbal admission (or other evidence) extrinsic of the deed.

## AMERICAN NOTES.

This case is cited by Browne (Parol Evidence, p. 16) to the proposition: “The true date of any instrument may be shown by parol, without regard to the date recited, and the date of delivery may be shown although different from the date of the instrument.” Citing also *Shangnessey v. Lewis*, 130 Massachusetts, 355; *Russell v. Carr*, 38 Georgia, 459; *Germania Bank v. Dister*, 67 Barbour, 333; 61 New York, 642; *Perry's Adm'r v. Smith*, 31 Texas, 277; *Abrams v. Pomeroy*, 13 Illinois, 133; *Barnet v. Abbott*, 53 Vermont, 120; *Hartsell v. Myers*, 57 Mississippi, 135; *Pascault v. Cochran*, 31 Federal Reporter, 358; *Moody v. Hamilton*, 22 Florida, 298; *Burditt v. Hunt*,

**No. 11.—Rex v. Inhabitants of Scammonden, 3 T. R. 474.**

25 Maine, 419; 43 Am. Dec. 289, citing the principal case; *Biggs v. Piper*, 86 Tennessee, 589.

Parol evidence is competent to show the true date of a note, or that it was not issued till after its date. *Biggs v. Piper, supra*; *Germania Bank v. Distler, supra*; *Towne v. Rice*, 122 Massachusetts, 71; *Bayley v. Taber*, 5 Massachusetts, 286; 4 Am. Dec. 57.

The principal case is cited in 1 Greenleaf on Evidence, sect. 285.

**No. 11.—REX v. INHABITANTS OF SCAMMONDEN.**

(K. B. 1789.)

**No. 12.—CLIFFORD v. TURRILL**

(LORD LYNDHURST, CH. 1845.)

## RULE.

EVIDENCE, extrinsic to the deed, may be given to show a consideration not expressed, or besides that expressed, in the deed; provided that the consideration so shown is not inconsistent with what appears on the face of the deed.

**Rex v. Inhabitants of Scammonden.**

3 Term Reports, 474-476 (1 R. R. 752).

*Deed.—Consideration.—Extrinsic Evidence.*

[474] The consideration expressed in the deed of conveyance was £28, but parol evidence was admitted to prove that £30 was the real consideration.

Two Justices removed C. Bottomley and his wife from Scammonden to Soyland, both in the West Riding of Yorkshire; and the sessions discharged their order, subject to the opinion of this Court on the following case.

The pauper being legally settled in Soyland, entered into an agreement with one Harrison for the purchase of an estate in Rishworth for £28 and the consideration mentioned in the deeds, and in the receipt indorsed was £28; but the appellants produced parol evidence to prove that, before the deeds were executed, the vendor declared that as the agreement was not in writing he was not bound by it, and having since had £30 offered for the estate, he would not take less, nor would he execute the deeds unless the purchase-money were made up that sum. Upon which the pauper

No. 11.—**Rex v. Inhabitants of Scammonden, 3 T. R. 474, 475.**

advanced £1 15s. more, which, with five shillings owing from Harrison to the pauper, was insisted made up the sum of £30; but the deeds were not altered, and the consideration therein mentioned was left according to the original agreement, viz. £28. The counsel for the appellants contended that this was a *bonâ fide* purchase for £30. But the Court were of opinion that no parol evidence could be given to contradict the consideration mentioned in the deeds. The estate purchased was the estate of Harrison's wife; and in the deed there was a covenant from Harrison that he and his \* wife would levy a fine unto C. Bottomley [\*475] in fee, of the premises, at the cost of Bottomley; towards the expense of which fine C. Bottomley left in the hands of his attorney four guineas. The pauper resided above three months upon the premises, and afterwards sold them to his brother, J. Bottomley. To this conveyance Harrison and his wife were parties; and it recited Harrison's covenant in the former deed to levy a fine; but as such a fine had not then been levied it was agreed that instead thereof Harrison and his wife should acknowledge and levy a fine of the premises unto Bottomley in fee, which fine was in Hilary Term, 1787, levied according'y; part of the expense of levying it was discharged by the four guineas so left in the hands of the attorney by the pauper, and the other part was paid by Bottomley. And the Court of Sessions being of opinion that the sum of four guineas was to be considered as part of the consideration (*vid. St. Paul's Walden and Kempton, fol. 238*) under the Act of Parliament, and that C. Bottom'ey by such purchase gained a settlement in Rishworth, discharged the order.

Law and S. Heywood, in support of the order of sessions, were stopped by the Court.

Chambre, *contra*, contended that the sessions properly rejected the parol evidence, which was offered to contradict the consideration mentioned in the deed. He said it was a general rule that, if a contract be reduced into writing, *a fortiori* if a deed, no parol evidence could be admitted to contradict it. And in *Clarkson v. Hanway*, 2 P. Wms. 203, it was held that the grantee could not give parol evidence to prove blood and kindred to have been the consideration of the conveyance, the consideration for which was expressed in the deed to be an annuity to be paid to the grantor; though the deed in that case was set aside on the ground of fraud. But

No. 12.—*Clifford v. Turrill*, 9 Jurist, 633.

Lord KENYON, Ch. J., said: It was clear that the party might prove other considerations than those expressed in the deed. It is permitted in all cases of covenants to stand seised to uses. And in *Filmer v. Gott*, 7 Bro. P. C. 70, where the considerations mentioned in the deed were £10,000 and natural love and affection, the Lords Commissioners of the Great Seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates being worth near £30,000. On an appeal to the House of Lords this was confirmed; and the jury on [\* 476] the trial of the \* issue finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the LORD CHANCELLOR.

ASHHURST, J., of the same opinion.

BULLER, J., and GROSE, J., absent.

*Order of sessions affirmed.*

### Clifford v. Turrill.

9 Jurist, 633, 634.

[633] *Specific Performance.—Parol Agreement.—Proof of Consideration not expressed in Deed.*

A parol agreement was entered into between A. and B., by which B. engaged to grant a life annuity to A., and find him a house of a certain value to live in; and A. agreed to execute an assignment of a lease to B. A. executed the assignment, which contained no recital of the annuity, &c., but was expressed to be made for a nominal consideration. *Held*, that the agreement having been well proved, the Court ought to decree specific performance of it.

Evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it.

The facts and evidence in the case sufficiently appear from Lord LYNDHURST's judgment. The following authorities were cited in the arguments: *Rev v. Semmonden*, 3 T. R. 474 (p. 744, *ante*): *Filmer v. Gott*, 4 Bro. P. C. 230, 1 Phil. on Evid., p. 549, 7th ed.; *Peacock v. Monk*, 1 Ves. Sen. 128; *Sadler v. Sadler* (1819), cited in 1 Mad. Ch. Pr. 360; *Bull v. Coggs*, 1 Bro. P. C. 140; *Adderley v. Dixon*, 1 S. & S. 607; *Withy v. Cottle*, id. 174; *Pritchard v. Ovey*, 1 J. & W. 396; *Taylor v. Neville*, cited in *Brexton v. Lister*, 3 Atk. 383; *Lady Herbert v. Powys*, 1 Bro. P. C. 355; *Lord Carbery v. Weston*, 1 Bro. P. C. 429; *Hartopp v. Hartopp*, 17 Ves. 184; *Craythorne v. Swinburne*, 14 Ves. 170;

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*Goss v. Lord Nugent*, 2 Nev. & M. 28; *Ree v. The Inhabitants of Chedde*, 3 B. & Adol. 833; *Brough v. Oddy*, 1 R. & M. 55; *Bunbury v. Bolton*, 1 Bro. P. C. 434.

June 11. LORD CHANCELLOR (LYNDHURST).—In this case the plaintiff was tenant of a farm in Buckinghamshire, at a rent of £240 a year, for the payment of which the defendant, who was his brother-in-law, was surety. The defendant had also lent to the plaintiff two sums of money, amounting together to £1000, for securing which, with interest, the plaintiff had given a warrant of attorney upon which judgment had been entered up. In default of payment, execution had been issued by the defendant, under which the sheriff levied the amount due by seizing the plaintiff's household furniture and effects, and the stock on the farm. The property seized was valued at £1540. The execution was issued for £1030. After the valuation, the defendant agreed with the sheriff to purchase the furniture and stock at the amount of the valuation, namely, £1540. If that agreement had been carried into effect, the defendant would have had to pay the sheriff the difference between £1540, the amount of the valuation, and the sum of £1030. Out of this sum so paid to the sheriff he would have paid the landlord a year's rent, amounting to £240, the poundage and incidental expenses of the levy, which would have left a surplus coming to the plaintiff of about £100. This state of things would have left the defendant in this situation: he would have been liable to the landlord for the rent in arrear beyond one year's rent, and also for the future rent so long as the lease continued; and the plaintiff, in consequence of the execution, not having any stock with which to carry on the farm, the burden of carrying it on would also have been thrown upon the defendant; so that it was not unnatural or unreasonable to suppose that what is said to have taken place with respect to the agreement should have taken place between the parties. The plaintiff states that the defendant was desirous of obtaining from him an assignment of all his interest in the farm under the lease; that the plaintiff, being unwilling to make this assignment, was pressed over and over again by the defendant to make it, and that he at last reluctantly made it, on the condition of the defendant agreeing to grant him an annuity of £40 a year as long as he lived, and a house of the value of £10 a year to live in. That is the case made on the part of the plaintiff. The first question is a question

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of fact, viz. whether any such agreement was entered into between the parties, and whether the terms of it have been satisfactorily made out by the evidence. Three witnesses were examined upon this point, the two Rolfs, father and son, and Everett,—the two first being respectable farmers, and the third being a respectable auctioneer. Both parties examined these witnesses in chief, and the defendant cross-examined them; so that they have been examined three times as to the particular circumstances of this agreement. They represent the transaction in this way: they all represent that the defendant was very desirous to obtain an assignment of the plaintiff's lease, and that the plaintiff was very unwilling to assign it; that they were employed as agents to obtain the plaintiff's consent to some arrangement with respect to it. They made proposals at different times to the plaintiff; they pressed him over and over again on the subject. The plaintiff, although most reluctant, at last consented. There was no room for mistake; it was done with deliberation; and if the witnesses are respectable, and there is nothing to show they are not so, it is impossible that they can be mistaken about the nature of the transaction; and it is clear, upon their evidence, that the agreement was entered into by the plaintiff and defendant. The Court can act upon their evidence; they were authorised to make the proposal to the plaintiff, and it was accepted by him. During the argument, I confess I was struck by the correspondence which took place between the parties, and it seemed impossible to reconcile the contents of that correspondence with the notion of such an agreement existing as that deposed to by the witnesses. I still feel great difficulty in reconciling them; and it appears that KNIGHT BRUCE, V. C., felt the same difficulty. It is to be observed, however, that the plaintiff was an ignorant and illiterate person, in great distress and poverty; the defendant was a substantial person, and they were connected by marriage. It may be supposed that, although such an agreement had taken place between the parties, the plaintiff did not consider that such an agreement could be enforced in a Court of justice, or that, by reason of his poverty, he had no means of enforcing it. This may, in part, explain the circumstance that the plaintiff made frequent applications to the defendant, who was a man of substance, for money; and that those applications were made more to the bounty of the defendant, than upon the ground of any claim of right the plaintiff

No. 12.—*Clifford v. Turrill*, 9 Jurist, 633, 634.

had. But, however strong the inferences to be drawn from the correspondence are, the letters cannot be put in competition with the direct consistent evidence of the three witnesses. I feel, therefore, compelled, after much doubt, to come to the conclusion upon this evidence, that the agreement has been established. The other points in the case are points of law. The first is, as to the consideration for the deed. It was said by the defendant's counsel, that you cannot go out of the consideration stated on the face of the deed. The deed recites the debt, the levy, and the valuation; and that, in consideration of the premises, and the payment in hand of 10s., the plaintiff assigned to the defendant; and it was said that the plaintiff could not go out of the deed to prove that there was any other consideration for the assignment than that stated upon the deed. Now, the settled rule of law is, that you may go out of the deed to prove a consideration that stands well with that \* stated on the face of the deed, but [\* 634] you cannot be allowed to prove a consideration inconsistent with it. The authorities cited to establish a contrary doctrine are not sufficient for the present purpose, they are all cases of parties who were strangers to the deed. But there are several old cases which prove that a consideration consistent with that stated in the deed may be given in evidence. That doctrine was first established in the case of *Villiers v. Beaumont*, 2 Dyer, 146 a, where the subject was very much discussed, and was decided by three Judges against the opinion of the remaining Judge. It was concurred in by many subsequent decisions, especially those reported by Lord COKE. The first is *Mildmay's Case*, 1 Co. Rep. 176 a, 2; in that case Lord COKE does not refer to the case in Dyer, but he states the proposition in the same terms in which it is there stated. In a subsequent case he refers to the case in Dyer; that is, the Court refers to that case, according to the report by Lord COKE. In *Vernon's Case*, 2 Co. Rep. 1 a, p. 248, and *Bedel's Case*, 4 Co. Rep. 40 a, p. 131, the doctrine is stated in the terms of the report in Dyer, so that the doctrine first stated in Dyer has been confirmed by repeated decisions, and it has ever since been consistently acted upon by the Courts of law and equity. There are later cases confirming the doctrine, and it has been confirmed by the case of *Doe d. Milburn v. Salkeld*, Willes' Rep. 673, which came before Chief Justice WILLFS, who referred to *Bedel's Case*, and restated the proposition contained in it. Id not have gone so

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minutely into the details of these cases but for the case before Lord HARDWICKE, in which he is said to have expressed a contrary opinion. It is not necessary, however, to question that opinion, in order to the decision of the point before me. In that case there was no consideration stated on the face of the deed. Lord HARDWICKE thought that a consideration might be proved; that was consistent with the deed: but Lord HARDWICKE went on to state that which was unnecessary to the decision of the case before him: that where a consideration, as "of natural love and affection," is stated in a deed, another cannot be proved, because that would be inconsistent with the deed. I do not know whether Lord HARDWICKE is correctly reported; but, if the case is accurately reported in Vesey, Lord HARDWICKE expressed an opinion at variance with the decisions in the cases I have cited, and it is probable that what he said may have been incorrectly reported. In this case, I am of opinion that evidence was properly received of a further consideration not mentioned, in addition to the consideration stated in the deed, and not inconsistent with it. The only remaining point is, whether the Court will decree specific performance of an agreement to grant an annuity not charged upon land but a mere personal annuity. It was said that the party might go to a Court of law and recover damages for breach of the agreement, and therefore it was not a case for the interference of a Court of equity. The answer to that is this, that there are several cases in which the contrary has been decided, and the point has been decided in the House of Lords. Damages at law would be estimated by a jury according to the average duration of human life; but it might or might not be a sufficient compensation, as the party might live beyond the average period of life. Damages therefore, would not necessarily be a compensation. I am, therefore, of opinion that the specific performance of an agreement for a personal annuity can be had in this Court, and that this is a case for such a specific performance. As to the agreement to provide a house of £10 a year, that, I think, falls within the same principle. Upon all these grounds, I think that the decision of the VICE-CHANCELLOR, both in point of fact and in law, was right, and that it ought to be affirmed.

*Decree affirmed with costs.*

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#### ENGLISH NOTES.

As a comparatively recent instance of the application of the principle may be cited *The Llanelli Railway, &c. Co. v. London & North Western Railway Co.* (1872), L. R. 8 Ch. 942, 42 L. J. Ch. 884, where it was held competent to show by evidence outside the instrument that an agreement to give running powers was made in consideration of a loan of £40,000, although no consideration was expressed in the agreement except the mutuality of some of the stipulations. The evidence was allowed to raise the presumption of an intent that the powers should be permanent.

It has been held that although a conveyance is expressed to be for natural love and affection, and for divers other good causes and considerations, it is competent to prove a valuable consideration so as to take the deed out of the statute 27 Eliz., c. 4. *Bayspole v. Collins* (1871), L. R. 6 Ch. 228, 40 L. J. Ch. 289. But the question of consideration under this Act is of less importance since the Voluntary Conveyances Act, 1893 (56 & 57 Vict., c. 21), which enacts that a conveyance shall not be deemed fraudulent or covinous within the Act 27 Eliz. merely by reason of its being voluntary.

#### AMERICAN NOTES.

In Browne on Parol Evidence, sect. 91, it is said: "An unexpressed consideration may be shown by parol;" citing *Hartley's Lessees v. McAnulty*, 4 Yeates (Penn.), 95; 2 Am. Dec. 396; *McClanahan v. Henderson*, 2 A. K. Marshall (Kentucky), 388; 12 Am. Dec. 412; *Nedvidek v. Meyer*, 46 Missouri, 600; *Hannon v. Oxley*, 23 Wisconsin, 519. And at sect. 92 it is said: "Parol evidence is competent to contradict the recital of receipt of the consideration, or to show an additional, smaller, or different consideration; but not to show an entire lack of consideration, or to contradict contractual expressions as to price or quantity." This is substantiated by *O'Neale v. Lodge*, 3 Harris & McHenry (Maryland), 433; 1 Am. Dec. 377; *Elysville Manufacturing Co. v. Okisko Co.*, 1 Maryland Chancery, 392; *Collins v. Tillou's Adm'r*, 26 Connecticut, 468; 68 Am. Dec. 398; *Linsley v. Lorely*, 26 Vermont, 123; *McCrea v. Purmort*, 16 Wendell (N. Y.), 460; 30 Am. Dec. 103; *Witbeck v. Waine*, 16 New York, 538; *McKinster v. Babcock*, 26 New York, 380; *Barker v. Bradley*, 42 New York, 320; *Wilkinson v. Scott*, 17 Massachusetts, 249; *Goodspeed v. Fuller*, 46 Maine, 141; 71 Am. Dec. 572; *Harrison v. Castner*, 11 Ohio State, 339; *Jones v. Jones*, 12 Indiana, 389; *Holbrook v. Holbrook*, 30 Vermont, 432; *Swafford v. Whipple*, 3 Iowa, 261; 54 Am. Dec. 498; *Bolles v. Beach*, 22 New Jersey Law, 68'; *Hamilton v. M'Guire's Ex'rs*, 3 Sergeant & Rawle (Penn.), 355; *Pritchard v. Brown*, 4 New Hampshire, 400; *Bowen v. Bell*, 20 Johnson (N. Y.), 338; 11 Am. Dec. 286; *Watson v. Blaine*, 12 Sergeant & Rawle (Penn.), 181; 14 Am. Dec. 669; *Harvey v. Alexander*, 1 Randolph (Virginia), 219; 10 Am. Dec. 519; *Tyler v. Carlton*, 7 Greenleaf (Maine), 175; 20 Am. Dec. 357;

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*Peck v. Vandenberg*, 30 California, 23; *Oliver v. Oliver*, 4 Rawle (Penn.), 141; 26 Am. Dec. 123; *Bach v. Packard*, 10 Vermont, 96; 33 Am. Dec. 185; *Depeyser v. Gould*, 2 Green Chancery (New Jersey), 474; 29 Am. Dec. 723; *Groves v. Steel*, 2 Louisiana Annual, 480; 46 Am. Dec. 551; *Rockhill v. Spraggs*, 9 Indiana, 30; 68 Am. Dec. 607; *Buckley's Appeal*, 48 Penn. State, 491; 88 Am. Dec. 468; *Sullivan v. Lear*, 23 Florida, 463; 11 Am. St. Rep. 388; *Booth v. Hynes*, 54 Illinois, 365; *Howell v. Moores*, 127 Illinois, 67; *Parker v. Fog*, 13 Mississippi, 260; 55 Am. Rep. 481; *Adams v. Lambard*, 80 California, 426; *Murdock v. Cox*, 118 Indiana, 266; *Scoggin v. Schloath*, 15 Oregon, 380; *Wood v. Moriarity*, 15 Rhode Island, 518; *Wheeler v. Billings*, 38 New York, 263; *McConnell v. Brayner*, 63 Missouri, 461; *Schillinger v. McCann*, 6 Greenleaf (Mass.), 361; *Hebbard v. Haughian*, 70 New York, 51; *Baldwin v. Dow*, 130 Massachusetts, 416; *Burnham v. Dorr*, 72 Maine, 198; *Holmes' Appeal*, 79 Penn. State, 279; *Fall v. Glover*, 34 Nebraska, 522; *Union M. L. Ins. Co. v. Kirchoff*, 133 Illinois, 338; *Fechheimer v. Tronstine*, 15 Colorado, 386. These decisions are based on the theory that the deed is not the contract, but the simple effectuation of the parol contract.

The later New York cases reverse the doctrine of *Schermerhorn v. Vanderheyden*, 1 Johnson, 139; 3 Am. Dec. 304, which was declared with very little apparent consideration, although similar doctrine was also laid down in Maryland (*Betts v. Union Bank*, 1 Harris & Gill, 175; 18 Am. Dec. 283; *Bladen v. Wells*, 30 Maryland, 577), South Carolina (*Graves v. Carter*, 2 Hawks, 573; 11 Am. Dec. 786), Louisiana (*Harrison v. Laverty*, 8 Martin, 213; 13 Am. Dec. 283), and Texas (*McCampbell v. Durst*, 73 Texas, 410).

Chief Justice APPLETON in *Goodspeed v. Fuller*, 46 Maine, 141; 71 Am. Dec. 572, accurately summed up the matter as follows: "It may be shown that the price of the land was less than the consideration expressed in the deed, as in *Bowen v. Bell*, 20 Johns. 338; or that it was more, as in *Belden v. Seymour*, 8 Conn. 394; or that it was contingent, dependent upon the price the grantee may obtain upon a resale of the land, as in *Hall v. Hall*, 8 N. H. 129; or that it was in iron, when the deed expressed a money consideration, as in *McCrea v. Purmort*, 13 Wend. 430; or that no money was paid, but that it was an advancement, as in *Meeker v. Meeker*, 16 Conn. 387; or that a portion of the price was to be paid by the grantee and the balance was an advancement, as in *Hayden v. Mentzer*, 10 S. & R. 329; or that it was paid by some one other than the grantee and thus raise a resulting trust, as in *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397; *Dudley v. Bosworth*, 10 Humph. 9." "The entire weight of authority tends to show that the acknowledgment of payment in a deed is open to unlimited explanation in every direction."

In *Fechheimer v. Tronstine*, 15 Colorado, 386, the Court said: "As a general rule, the consideration recited in an instrument under seal, as well as in a simple receipt, is *prima facie* evidence only, and may be controlled or rebutted by parol proof. It is now firmly established that such recitals stand upon a distinct basis, and are merely *prima facie* evidence against the party making them. They are like ordinary receipts which are open to explanation by parol. This question has been frequently before the Courts, and the rule in favor of

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the admissibility of such evidence is now well settled. That this is true of ordinary receipts for money, there can be no doubt. This is said by Dr. Wharton to be ‘a necessary consequence of the informality of such instruments.’ 2 Whart. Ev., § 1064. The same rule has been applied in many cases to the consideration clause in a deed under seal. See *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. 247; *Thayer v. Viles*, 23 Vt. 494; *White v. Miller*, 22 id. 380; *Belden v. Seymour*, 8 Conn. 304; *Bowen v. Bell*, 20 Johns. 338; *Bassett v. Bassett*, 55 Me. 127. In *Wilkinson v. Scott*, *supra*, it was held that a receipt was always open to explanation, and the fact that it was under seal did not change the rule; and although a grantor was estopped by his deed to deny that he granted or that he had a good title to the estate conveyed, yet he was not bound by the consideration expressed; but that the real consideration might be proven. In *Clapp v. Tirrell*, *supra*, it was held that the consideration expressed was only *prima facie* evidence of payment, and that it might be controlled and rebutted by proof. And in *Thayer v. Viles*, *supra*, it was held that the recitals in a deed of the amount of the consideration and its receipt will not estop a party from sustaining an action for the price. In *White v. Miller*, *supra*, it was decided that such recitals were subject to explanation. In *Belden v. Seymour*, *supra*, it was said: ‘The only operation of a clause in a deed regarding the consideration is to prevent a resulting trust in the grantor, and to estop him forever to deny the deed for the uses therein mentioned.’ We deem further reference to authorities unnecessary. It is sufficient to say that it is clearly established by the great weight of authority, that as a general rule, the consideration in an instrument under seal, as well as in a simple receipt, may be explained by parol evidence.”

It may be shown that the consideration was an exchange of lands: *Bristol Sav. Bank v. Stiger*, 86 Iowa, 314. Or in part the assumption of a mortgage: *Hopper v. Culhoun*, 52 Kansas, 703; 39 Am. St. Rep. 363. Or in a deed from father to daughter, a donation to support the title of a purchaser from the daughter, the statute allowing a married woman to convey property acquired by gift: *Velton v. Carmack*, 23 Oregon, 282; 20 Lawyers’ Rep. Annotated, 101. Or in a deed from sister to brother, a further agreement by the grantee to support the parents: *Wilfong v. Johnson*, 41 West Virginia, 283. Or in a deed to a railroad company, expressed to be “benefit to be derived from the building of the road and one dollar paid,” the company’s promise to build a station on the land: *Louisville, &c Ry Co. v. Neafus*, 93 Kentucky, 53. Or that part of the consideration was that intoxicating liquors should not be sold on the land: *Hall v. Solomon*, 61 Connecticut, 476; 29 Am. St. Rep. 218. Or an oral agreement to pay certain debts of the grantor: *Price v. Miller* (So. Carolina), to appear. Or that instead of love and affection it was money: *Nichols v. Burch*, 128 Indiana, 324. Or that there was an agreement to survey the land and pay for excess or deduct for deficiency: *Ludeke v. Sutherland*, 87 Illinois, 481; 29 Am. Rep. 66. Or to pay more in the future: *Kickland v. Menasha Co.*, 68 Wisconsin, 34; 60 Am. Rep. 831. Or to execute a will in the grantor’s favor: *Manning v. Pippen*, 86 Alabama, 357. Or that it was in full of all claims of the grantee, including one in suit: *Groves v. Steel*, 2 Louisiana Annual, 480; 46 Am. Dec. 551; *Kimball v.*

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*Myers*, 22 Michigan, 276; 4 Am. Rep. 487. Or also in full of a claim for trespass: *Hodges v. Heal*, 80 Maine, 281. An absolute mortgage may be shown to have been a mere indemnity for future advances: *Moses v. Hatfield*, 27 South Carolina, 324. It may be shown that the grantee took subject to an incumbrance of which he knew: *Allen v. Lee*, 1 Indiana, 58; 48 Am. Dec. 352. So a reservation of growing crops may be shown: *Kluse v. Sparks*, 10 Indiana App. Ct. 444.

“The rule does not forbid an inquiry into the object of the parties in executing or receiving the instrument.” *Peugh v. Davis*, 96 United States, 336.

The contrary is held in a few jurisdictions. Thus in *Wilkinson v. Wilkinson*, 2 Devereux Equity (Nor. Car.), 377, it is said: “The consideration upon which a deed is made is an important part of the contract; and when it is distinctly declared, parol evidence is not more admissible to contradict or substantially to vary that, than any other terms upon which the parties have expressed their agreement.” So a valuable consideration may not be substituted for love and affection. *Houston v. Blackman*, 66 Alabama, 559; 41 Am. Rep. 756; *Christopher v. Christopher*, 64 Maryland, 583 (citing *Clarkson v. Hanway*, 2 P. Wms. 204); *Burrage's Lessee v. Beardsley*, 16 Ohio, 438 (citing *Hind's Lessee v. Longworth*, 11 Wheaton (U. S. Sup. Ct.), 214).

But where the consideration recited is the release of a debt, it may not be shown to include the release of the grantor's liability to the grantee as guardian. *Baum v. Lynn*, 72 Mississippi, 932; 30 Lawyers' Rep. Annotated, 441. So a parol reservation of a growing crop may not be shown. *Adams v. Watkins*, 1C3 Michigan, 431. So where the recital is that the purpose is the widening of a street, and that the city should cause the removal of the grantor's fixtures on the land conveyed, no agreement of the city to perform other acts may be shown. *Weaver v. Gainesville*, 1 Texas Civil Appeals, 286: “This recital is more than the mere receipt of the payment of the purchase-money; it is also the written evidence of a contract between the parties that the plaintiff would grant the right of way, and that the defendant would construct the road over the same.” So in respect to a written lease, evidence is not admissible to show that part of the rent was to be taken out in board. *Stull v. Thompson*, 154 Penn. State, 43. “This was a direct contradiction of the terms of the lease, and was properly excluded. The case is admittedly close under some of our decisions, but we think it was properly decided.” (Clearly so, because the agreement was executory.)

Parol evidence that the deed was without consideration may not be shown as between the parties. *Gardner v. Lightfoot*, 71 Iowa, 577; *Feeney v. Howard*, 79 California, 525; *Salisbury v. Clarke*, 61 Vermont, 453; *Hammond v. Woodman*, 41 Maine, 177; 66 Am. Dec. 219; *Finlayson v. Finlayson*, 17 Oregon, 347; 3 Lawyers' Rep. Annotated, 801; *Hebbard v. Haughian*, 70 New York, 54; *Goodspeed v. Fuller*, 46 Maine, 141. Non-payment of a nominal consideration may not be shown to defeat a deed. *Merriam v. Harsen*, 2 Barbour Chancery (N. Y.), 267.

But evidence is admissible to show that a mortgage was without consideration, because of its executory character. *Baird v. Baird*, 145 New York, 659; 28 Lawyers' Rep. Annotated, 375.

No. 13.—*Lampon v. Corke.*—Rule.No. 13.—*LAMPON v. CORKE.*

(K. B. 1822.)

No. 14.—*BOYD v. PETRIE.*

(CH. 1872.)

No. 15.—*DANBY v. COUTTS & CO.*

(CH. 1885.)

## RULE.

WHERE the operative part of a deed is unambiguous and consistent with the general scope and character of the deed, its effect is not to be cut down by a recital; but where the operative part is ambiguous, it may be controlled by a clear and unambiguous recital.

In a release, general words in the operative part are qualified by the recital.

***Lampon the Younger v. Corke.***

5 Barn. &amp; Ald. 606–612 (24 R. R. 488).

*Release.—Controlled by Recitals.*

A deed containing a general release of all debts, &c., recited that the [606] releasee had previously agreed to pay to the releasor the sum of £40 for the possession of certain premises, and that in “consideration of the said sum of £40 being now so paid as hereinbefore is mentioned,” and also in consideration of the sum of 10s. apiece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, did release, &c. There was also a receipt for the sum of £40 indorsed on the release. But it appeared on action afterwards brought for this sum that, in fact, it had never been paid. *Held*, that this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of £40.

Assumpsit against the defendant, as the maker of the following promissory note, dated Edenbridge, April 11th, 1821, “Two months after date I promise to pay Mr. Thomas Lampon, junior, or order, the sum of £40, value received this day, in things appraised by Mr. Doubell, and in having possession given to me of the premises lately held under me by Thomas Lampon, senior,

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afterwards by the sheriff." The declaration contained, also, counts for goods sold and delivered, and the usual money counts. Plea, general issue. At the trial at the last London sittings, before ABBOTT, Ch. J., it appeared that the defendant was the landlord of certain premises occupied by the plaintiff's father, and that the plaintiff having taken possession of the premises, and the

crops growing thereon, under a writ of execution against [\* 607] \* his father, the defendant, in order to get possession of

the premises and crops, gave the note in question, which, when originally signed by him, did not contain the words "or order." These words were inserted on the 14th April, 1821, without his knowledge. Under these circumstances the LORD CHIEF JUSTICE thought the count on the note could not be sustained, and the plaintiff then proceeded on the other counts in the declaration. The defendant, in answer to the plaintiff's case, put in a deed, executed by the plaintiff, dated 14th April, 1821, which recited that Thomas Lampon the elder was in possession of certain hereditaments and premises, as tenant to the defendant, but which tenancy would have expired on the 29th day of September, 1821, had it not been otherwise determined; and that the plaintiff had recovered a judgment against the said Thomas Lampon the elder for the sum of £450, besides costs of suit; and thereupon all the estate, term, and interest of the said Thomas Lampon the elder, of and in the said hereditaments and premises, together with the crops growing thereon, were taken in execution, by virtue of a writ of *fieri facias*, and the warrant grounded thereon, at the suit of the plaintiff; and that the defendant, being desirous of obtaining possession of the premises, applied to, and prevailed on, the plaintiff, as such judgment creditor, to give him possession of the same, which the plaintiff accordingly did, on the 11th day of April, instant, he, the said defendant, having then agreed to pay unto the plaintiff the sum of £40 for such possession; and that the defendant had requested the said Thomas Lampon the elder and the plaintiff to execute an assignment of all their estate,

title, and interest in the said hereditaments, which they [\* 608] had agreed to do; and then \* proceeded to state, that, in

pursuance of such agreement, "and in consideration of the said sum of £40 being now so paid to the plaintiff, as hereinbefore is mentioned;" and also in consideration of the sum of 10s. apiece to the said Thomas Lampon the elder and the plaintiff, in hand

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well and truly paid by the defendant, immediately before the execution of those presents, the receipts of which said several sums of money they did severally and respectively acknowledge; and from the same sums respectively and every part thereof did thereby severally and respectively release the defendant, his heirs, &c., the plaintiff bargained, sold, &c.; and Thomas Lampon the elder bargained, sold, ratified, and confirmed unto the defendant his heirs, &c., all the messuages or tenements, &c.; and it was further stated, that for the considerations thereinbefore mentioned, and also of the sum of 10s. to the plaintiff in hand paid by the defendant, immediately before the execution of those presents, the receipt whereof was thereby acknowledged, he the plaintiff generally released the defendant, his heirs, &c., from all dues, sums, claims, and demands whatsoever, both at law and in equity. There was also indorsed on the deed a receipt by the plaintiff for the sum of £40, dated April 14th, 1821. The LORD CHIEF JUSTICE thought this deed not a sufficient answer to the plaintiff's case, it being clearly proved and admitted that, in fact, the sum of £40 above mentioned had never been actually paid. The plaintiff accordingly had a verdict; and now,

PULLER, by leave of the LORD CHIEF JUSTICE, moved to enter a nonsuit. Here the release was a complete answer to the plaintiff's demand, and he cannot be allowed after an admission, by deed, of the fact of payment \* of the £40, to prove, by [\* 609] parol evidence, that it had not been so paid. *Rowntree v. Jacob*, 2 Taunt. 144; Co. Litt. 512. The plaintiff's remedy, if he has any, is in equity; but at law the release is a good defence; for he has, in terms, distinctly admitted the receipt of the £40.

ABBOTT, Ch. J.:—

It appears to me that in this case the release does not operate to prevent the plaintiff from recovering. The deed is, indeed, inaccurately worded; but the Court ought to give such an effect to it as may best consist with what appears to have been the manifest intention of the parties, and what may best conduce to the real justice of the case. In the recital it speaks, in the first place, of an agreement to pay, and not of the actual payment of the sum of £40. And then the consideration for the release is stated in these words: "In consideration of the said sum of £40 being now so paid to the said Thomas Lampon the younger, as hereinbefore is mentioned." These latter words show that

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the parties meant to refer to the former part of the deed, where it speaks of an agreement to pay this sum; and that we ought to read the whole sentence thus: "In consideration of the said sum of £40 being now so agreed to be paid as aforesaid." If that were not so, this absurdity would follow: that the deed would recite an agreement to release in consideration of the payment of £40, and then would proceed to release the defendant from the payment of that very sum itself. We have been pressed with the difficulty arising out of the words immediately following: "the receipt of which said several sums of money they, the said Lampon the elder and plaintiff, admit, &c." But these may and do refer, most properly, to the payment of 10s. apiece to those persons [\* 610] \* mentioned immediately before. And by so construing the deed the whole becomes intelligible, and consistent with the justice of the case and the obvious intention of the parties. I think, therefore, that the operation of this deed was not to release this sum, inasmuch as the release, though in general terms, must be controlled by the previous recital. The verdict is, therefore, right.

BAYLEY, J.:—

The true question is, whether there is anything in this deed which clearly shows that this sum of £40 has been paid to the plaintiff, and that not by a security, but in money. It must necessarily be admitted that this release would have been an answer equally to the action on the note, if the note had remained unaltered. Then, are the words so clear as to leave no doubt? It first recites that the £40 had been agreed to be paid. The recital does not go on to say, in addition to this, that the £40 had been paid; but when we come to the operative part, we find it stated that, "in consideration of the sum of £40 being now so paid, as hereinbefore is mentioned," &c. Now, the words "so paid," and "as hereinbefore is mentioned," obviously do not refer to a new payment, but to some former payment, mentioned in the deed. Then, if we look back, we find no actual payment there stated, but only an agreement to pay. The words of the deed, therefore, are ambiguous, and let us in to inquire whether there was an actual payment or not. And on the facts stated there is no doubt as to that point. The Court is not, therefore, prevented from deciding according to what appears plainly the justice of the case; for although the note, as a security, is invalid, yet the debt

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for which it was given, not being paid, remains still due to the plaintiff.

\* HOLROYD, J. :—

[\* 611]

The plaintiff is entitled to our judgment, unless he is estopped, either by the deed of release or by the receipt indorsed on it. As to the latter, it is sufficient to observe, that, not being under seal, it cannot amount to an estoppel; but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case. And, if so, then, as it is admitted that no such payment has actually been made, this receipt becomes of no importance. As to the deed, it seems to me to depend on the construction to be given to the words already referred to, “In consideration of the said sum of £40 being now so paid, as hereinbefore is mentioned.” If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different. But here there are words of reference; and we must, therefore, look to the prior part of the deed, and there we find no statement of actual payment, but only of an agreement to pay. It seems to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the truth of the transaction. Estoppels are odious in the law, and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. That is not the case in this deed, and therefore I think it is no estoppel; and then the verdict is right.

BEST, J. :—

If a party give a general release, it will, undoubtedly, extend to all debts then due; and the passage cited from Co. Litt. is to that effect. But that must be understood of a release without any previous recital qualifying its operation. If there be introductory matter, that will qualify the general words of the release. That is the case here. It is quite clear, looking at the recital, what was the intention of these parties. \*The words, [\* 612] “as hereinbefore is mentioned,” show that the parties referred to the previous part, where an agreement to pay is stated. In *Rowntree v. Jacob*, the debt was, in general terms, admitted to have been paid. But that is not so here, there being words of reference annexed. As to the receipt indorsed, that stands on a different ground; for, not being under seal, it is no estoppel, and its truth may be disputed. This rule must, therefore, be refused.

*Rule refused.*

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No. 14.—**Boyd v. Petrie, L. R. 7 Ch. 385.**

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**Boyd v. Petrie.**

L. R. 7 Ch. 385-395 (s. c. 41 L. J. Ch. 378; 25 L. T. 460; 20 W. R. 513).

*Power of Sale. — Mortgage. — Transfer of Mortgage. — Destruction of Power.*

[385] In 1825 D. mortgaged an estate to I. in fee (subject, among other incumbrances, to an existing mortgage for £3000) to secure £27,000 payable at the end of twelve months, with interest in the meantime. The mortgage deed contained a power of sale providing that if default should be made in payment of the interest, or any part of it, for a month after any of the days appointed for payment, or in payment of the principal on the appointed day, then at any time thereafter, though no advantage should have been taken of any previous default, I., his heirs or assignis, might sell. In 1830, I. having called for payment, a deed of transfer was executed to K. and R. This deed, after reciting that I. was entitled to the prior mortgage for £3000, recited the mortgage of 1825, and that "in the now reciting indenture a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be exercised," and reciting the calling in of the mortgage moneys, and that D. had applied to K. and R. to discharge them, "which K. and R. have agreed to do on having the said sums so agreed to be advanced as aforesaid secured to them by an assignment of the said several securities hereinbefore recited, and generally in the manner hereinafter appearing." Then, in consideration of £30,000 paid to I. by K. and R., I., at the request of D., assigned, and D. confirmed to K. and R., the moneys due on the mortgages, "and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained." Then I. conveyed and D. confirmed to K. and R. in fee the mortgaged estates, subject to a proviso for redemption if D. should pay the principal of £30,000 on the day therein named, being at the expiration of seven years, and should in the meantime pay interest half-yearly on the days therein named. It was agreed that the money should remain on the security for seven years, D. not to be at liberty to pay it off sooner, and K. and R. not to call for payment sooner, unless default was made in payment of interest, or D. died. There was a power of sale to arise if default should be made in payment of the principal or interest contrary to the terms of the proviso for redemption, and a covenant by K. and R. that no sale of the property should be made without three months' notice. The persons claiming under K. and R. having put up the property for sale, the purchasers objected that the power of sale in the deed of 1825 was gone, and that the vendors could not make a good title as against mesne incumbrancers."

*Held* (reversing the decision of the MASTER OF THE ROLLS), that the power of sale in the mortgage of 1825 was still subsisting and capable of being exercised.

This was an appeal from an order of Lord ROMILLY, M. R., as far as it declared a power of sale contained in a mortgage deed of the 15th of June, 1825, to have been extinguished.

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\* By an indenture of release dated the 15th of June, [\* 386] 1825, made between Robert Foster Grant Dalton (then R. F. Grant) of the first part, divers other persons of the next ten parts, and Charles Ingram of the twelfth part, and by a fine levied in pursuance of it, the Ingoldsthorpe and Snettisham estates were conveyed (subject, as regarded the Ingoldsthorpe estate, to a mortgage dated the 11th of January, 1785, for £15,000), to the use of Charles Ingram in fee, subject to a proviso for reconveyance to Dalton in fee on payment by him, his heirs, executors, administrators, or assigns, to Ingram, his executors, administrators, or assigns, of the sum of £27,000 on the 15th of June, 1826, and of interest as therein mentioned. This indenture contained a power of sale, which provided that if default should be made in payment of the interest of the £27,000, or any part thereof, for the space of one calendar month or upwards next after any of the days or times thereinbefore appointed for payment thereof, or default should be made in payment of the principal sum of £27,000 on the day thereinbefore appointed for payment of the same, then and in such case, or at any time thereafter, although no advantage should have been taken of any previous default, it should be lawful for Ingram, his heirs or assigns, to sell the mortgaged property, either together or in parcels, &c., &c. The power contained the usual clauses, except that there was no stipulation for giving notice before exercising it.

By an indenture dated the 23rd of July, 1827, the sum of £3000, part of the mortgage debt of £15,000, secured by the indenture of the 11th of January, 1785, was assigned to Ingram absolutely.

By an indenture of release dated the 2nd of July, 1830, grounded on a lease for a year, and made between Ingram of the first part, R. F. G. Dalton of the second part, and Key and Richardson of the third part, after reciting, among other things, the mortgage of the 11th of January, 1785, and after a recital of the deed of the 15th of June, 1825, concluding with, "And in the said now reciting indenture a power or trust for sale is also contained for the better securing of the said principal sum and interest; but the said power has not been and is not intended to be exercised;" and after reciting the assignment to Ingram of the 23rd of July, 1827, and reciting that the said two sums of £3000 and £27,000 remained due to Ingram, on his said securities, but that all interest \* for the same had been paid up at the [\* 387]

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date of the now stating deed, and that Ingram had applied to Dalton for payment of those sums, and that Dalton, not being provided with the means of paying them, had applied to Key and Richardson to discharge the same, “which the said W. Key and E. Richardson have agreed to do on having the said sums so agreed to be advanced as aforesaid secured to them by an assignment of the said several securities hereinbefore recited, and generally in the manner hereinafter appearing,” it was witnessed that in pursuance of the said agreement, and in consideration of £30,000 paid by Key and Richardson to Ingram at the request of Dalton (the receipt of which was acknowledged in the usual form), Ingram, at the request of Dalton, granted and assigned, and Dalton confirmed, to Key and Richardson, their executors, administrators, and assigns, the said principal sums of £3000 and £27,000, with all interest thenceforth to become due in respect of them, “and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage and of every covenant and security therein respectively contained; to have, hold, receive, and take the said several principal sums unto and by the said W. Key and E. Richardson, and the survivor of them, his executors, administrators, and assigns, to and for their and his own proper use and benefit.” Then by another witnessing part, Ingram, at the request of Dalton, released, and Dalton confirmed, to Key and Richardson, their heirs and assigns, the estates comprised in the mortgage securities, and all the estate, right, title, interest, property, claim, and demand of Ingram and Dalton, or either of them, of, in, to, and out of the same; “to have and to hold the said manors, messuages, &c., with their and every of their appurtenances, to the said W. Key and E. Richardson, their heirs and assigns, for ever, free from the several provisos for redemption contained in all and every or any of the said indentures hereinbefore recited, subject nevertheless to the said in part recited indenture of mortgage of the 11th of January, 1785, and subject also to the proviso for redemption hereinafter contained.” The proviso was to this effect: that if Dalton, his heirs, administrators, or assigns, should pay to Key and Richardson, or the survivor of them, his executors, administrators, or assigns, the sum of £30,000 [\* 388] on the 2nd of July, 1837, subject as thereafter \* mentioned, and should also half-yearly on the 2nd of January and July in every year, in the meantime and until payment of the

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principal, pay interest for the same at the rate of £5 per cent per annum without any deductions, Key and Richardson, or the survivor of them, his heirs or assigns, would reconvey. There followed a proviso that the £30,000 should remain on this security for seven years, without any right on the part of Dalton or his representatives to pay it off sooner, and without any right on the part of Key and Richardson to foreclose or to call for payment within that period, subject to the further proviso that if default should be made in payment of the interest of the £30,000 or some part thereof, for the space of three calendar months, from any one of the half-yearly days of payment, or if Dalton should die within the seven years, then it should be lawful for Key and Richardson, or the survivor of them, his executors, administrators, and assigns, if they or he should think fit, and should signify the same by some writing under his or their hand or hands, to call in the principal and interest within the seven years, as if the term of seven years had expired by lapse of time. There was a covenant for payment of the £30,000 following the terms of the proviso for redemption. There was a power of sale to arise "if default shall be made in payment of the said principal sum of £30,000, or the interest thereof, or any part thereof, contrary to the proviso or agreement for redemption hereinbefore contained, "with an ample clause exonerating purchasers from seeing to the validity of the sale as regarded the giving of such notice as thereafter was mentioned, or otherwise. At the end of the power was this covenant:" "And each of them, the said W. Key and E. Richardson, doth by these presents for himself, &c., covenant with the said R. F. G. Dalton, his heirs and assigns, that no sale or sales, or notice of such sale or sales, of the said hereditaments and premises, or of any part of the same, shall or may be made or given by the said W. Key and E. Richardson, or the survivors, &c., before or until he or they shall have given to the said R. F. G. Dalton, his heirs or assigns, or left with him or them at the last or most usual place of his or their residence or abode in England, three calendar months' notice in writing demanding payment of the money which at the end of the time shall be due to the said W. Key and E. Richardson, or the survivor, &c., \* and the said R. F. G. [\* 389] Dalton, his heirs or assigns, shall have made default in payment of the same at the end of three calendar months, to be computed from the delivery or service of such notice.'

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In the interval between the deeds of 1825 and 1830, Dalton had executed mortgages of the estate to other parties. He ultimately died insolvent.

The property was put up for sale by parties claiming under Key and Richardson, and was sold in lots. Some of the purchasers took the objection that the power of sale in the deed of June, 1825, was destroyed by the deed of July, 1830, and that a good title could not be made without the concurrence of the mesne incumbrancers. The parties interested in the £27,000 and £3000 thereupon filed their bill against the parties who claimed to be mesne incumbrancers, praying that it might be declared that the power of sale in the mortgage of 1825 was subsisting, and that the sales might be carried into effect, or if the Court should be of opinion that the power was not subsisting, then for foreclosure. The purchasers were not made parties, but appeared by counsel, and submitted to be bound.

Lord ROMILLY, M. R., decided that the power of sale had been destroyed. (L. R. 10 Eq. 482.)

The priority of the plaintiffs was not disputed, but the property having risen greatly in value since the contracts for sale were entered into, the mesne incumbrancers, whose security was scanty, were desirous that the sale should not be completed.

Sir Roundell Palmer, Q. C., Sir R. Baggallay, Q. C., and Mr. Charles Parke, for the plaintiffs, in support of the appeal:—

We contend that the MASTER OF THE ROLLS has erred in not giving effect to the express intention of the parties that the transferees should have all the powers and remedies which were vested in the transferor, and in controlling those plain words by inference from the recitals. The recital that the power had not been and was not intended to be exercised, which has been relied on, means in fair construction only this: that it had not been exercised, and that it was not intended to be exercised, except subject to the provisions

of the transfer deed,—not that it was not in any circumstances [\* 390] to be exercised. The very expression that it was not intended to be exercised imports that it was still to exist. The next recital shows the intention that the transferees were to have all the powers of the deed of 1825. A new power of sale was of use because the old power only extended to the £27,000, not to the other £3000, so the giving it is not inconsistent with the transferees retaining the old one. It has been decided that

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the concurrence of the mortgagor in a transfer deed with a new proviso for redemption and covenant for payment does not extinguish the old power of sale. *Young v. Roberts*, 15 Beav. 558. The judgment in *Curling v. Shuttleworth*, 6 Bing. 121, is unintelligible. The operative part being clear, it is not to be departed from *ut res pereat*. *Carver v. Richards*, 1 D., F. & J. 548, 561; *Young v. Smith*, 35 Beav. 87. A clear operative part cannot be modified by a recital. *Wellesley v. Lord Mornington* (D. P. not reported).

The Solicitor-General (Sir G. Jessel) and Mr. Chapman Barber for one of the mesne incumbrancers:—

We contend that there is no such rule as that a clear operative part cannot be controlled by a recital. The whole instrument must be looked at, and the intention of the parties collected from it. *Walsh v. Trevannion*, 16 Sim. 178, 15 Q. B. 733, clearly shows this. The recital amounts to an agreement. *Rigby v. Great Western Railway Company*, 4 Railw. Cas. 175. The assignment of the powers is relied on; but the appellants admit that it could not operate according to its terms: they say it was suspended; we say it was destroyed by its inconsistency with the present deed. The bargain here was, that the old power should be gone. It is objected that this gives an advantage to mesne incumbrancers, and no doubt it does; but so does the clause providing that the money shall not be called in for seven years. To recite the power of sale in this unusual way merely for the purpose of introducing a statement that it is not intended to be exercised, is inconsistent with the idea of keeping it on foot. The mortgagor had an object in getting rid of the old power, for it was exercisable without notice. Mesne incumbrancers are not \* alluded to in the deed, [\* 391] and it must be construed as if there had not been any. The new power requires three months' notice, so it is clear that it was intended to substitute one for the other.

[The Lord Justice MELLISH.—May not the covenant not to sell without notice apply to both powers? It does not refer specifically to the latter power.]

The scope of the deed shows that only the latter power is referred to.

[The Lord Justice MELLISH.—Can the parties have intended to make a sale impossible without the consent of the mesne incumbrancers?]

Possibly not, but that only comes to this, that they made a bargain without foreseeing all its results.

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Mr. Bristowe, Q. C., and Mr. Phear, for other mesne incumbrancers:—

We submit that there is no jurisdiction to make a mere declaratory decree that this power can be exercised without our consent. *Rooke v. Lord Kensington*, 2 K. & J. 753 [*ante*, p. 717].

Sir W. M. JAMES, L. J.—This objection appears to me a mere technicality. Subsequent incumbrancers stand very much in the position of *cestuis que trust*, and I see no objection to a bill being filed against them asking for a declaration that a sale will be good without their concurrence.

Sir G. MELLISH, L. J., concurred.

Mr. Schomberg, Q. C., and Mr. E. James; Mr. Kenyon, Q. C., and Mr. Haynes; Mr. Southgate, Q. C., and Mr. Nalder; and Mr. Owen, for other parties.

Mr. Batten, for the purchasers, appeared and submitted to be bound.

Sir Roundell Palmer, in reply.

[\* 392] \* Sir W. M. JAMES, L. J.:—

We think that after the full argument which this case has undergone, it is not necessary to reserve our judgment. I am of opinion that too much effect has been given by the MASTER OF THE ROLS in his declaration to the words of the recital, that it was not intended that the power of sale should be exercised. It appears to me quite clear that apart from that recital there could have been no doubt whatever upon the intention of the parties with respect to the former securities. It is the common course of conveyancing, where a new mortgagee is advancing money for the purpose of paying off persons entitled to old securities, to take an assignment of all the existing mortgage debts, and also of all the securities, of all the remedies, of everything that the old mortgagees had, so as to keep them alive for the further security of himself as new mortgagee, in order that he may be protected against any intervening incumbrances which may have been made by the mortgagor in the interval between the dates of the two deeds. It being of course possible that the borrower may have created some mesne incumbrance, it is always considered prudent to take an assignment of everything then existing in the nature of security, not for the purpose of altering the bargain between the mortgagee and the mortgagor, but for the purpose of having an additional security for the performance of that bargain. In

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the present case, both sides having agreed that the mortgage should remain on foot for seven years, unless the mortgagor made default in payment of interest or died in the interval, nothing was to be done, no power was to be exercised, no remedy was to be resorted to, and no right was to be enforced, except in conformity with the terms of this new bargain, and with due regard to the rights of the mortgagor under it. There is in this nothing that is inconsistent with the subsistence of the old powers, and in my judgment the argument drawn from the final recital is unanswerable, that the new mortgagees have stipulated for, and have obtained as the price of their advance of the money, that the old mortgage debts and mortgage securities should be kept alive for their security. That being so, it would require something very precise and clear in any of the previous recitals or expressions in the deed to control the operative part of it, or to affect the precisely expressed agreement contained \* in the final [\*393] recital, which is afterwards carried into effect by the operative part. Now, are those words, "but the said power has not been and is not intended to be exercised," fairly capable of an interpretation consistent with the good faith and honesty of the deed? It appears to me that they are, as they may be understood to mean that the power has not been exercised, and it is not intended to be exercised at present, or for a certain time, or in any manner inconsistent with the stipulations of this contract, or with the intention of the parties. This intention is carried into effect by a covenant, which, it appears to me, according to its true and fair and plain meaning, extends to prohibit any sale under the old power, or under any power the mortgagees might have, except upon three months' notice; and another clause prohibits the calling for payment for a term of seven years, unless on default by or death of the mortgagor; which would extend to any remedy which the mortgagees might have sought to enforce against the mortgagor,—a clause which the Court would have enforced against the mortgagee so long as the mortgagor was living and not in default.

That being so, I am of opinion that the recital of the intention does not amount to an agreement between the parties that the power is never to be exercised. It imports no more in my judgment than that the power is not to be exercised in the manner in which, independently of that recital, it would have been, but only

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as a collateral security for the purpose of giving effect to the security thereby expressed to be effected.

I am, therefore, of opinion that the declaration of the MASTER OF THE ROLLS, that the power of sale is no longer subsisting, ought to be varied, and a declaration substituted for it, that the power of sale is still subsisting, and capable of being carried into effect.

Sir G. MELLISH, L. J.:—

I am of the same opinion. The sole question, to my mind, is, whether the general scope and object of the deed is controlled by the recital, because, independently of the recital, I do not think any reasonable doubt can be entertained that the object of the parties, as shown by the entire deed, was, that the whole of the existing securities should be kept alive, not, of course, for the pur-

pose of being immediately enforced, but should be kept [\* 394] alive \*as a collateral security, if necessary, for the purpose of the security intended to be effected by the deed itself. The object of keeping alive such old securities obviously is to prevent any persons who may be mesne incumbrancers between the date of the old mortgage and the date of the present mortgage from obtaining any rights which may prejudice the security. It appears to me very irrational to suppose that any new mortgagees advancing money for the purpose of paying off an old mortgage, and taking an assignment of that old mortgage, should not have every right which the old mortgagees had, so far as those rights are consistent with the terms on which the money is advanced under the new mortgage.

The whole question turns, as it seems to me, on the meaning of the recitals. I quite agree that although the clause in question is only in the recitals, and not in the operative part of the deed, still if it had in unambiguous terms stated that the power was never to be exercised,—if, instead of being “has not been and is agreed not to be exercised,” or “has not been and is not to be exercised,”—I should have thought that that would have amounted to an agreement that it should never be exercised; and although I might have thought it strange that mortgagees advancing their money should consent to such a clause, yet if I found the clause there I should have felt bound to give effect to it. But the literal meaning of the words does not import that. All that the words literally import is, that the power has not been exercised, and that there is no present intention of exercising it; and although I

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quite admit that if from the whole scope and context of the deed it could be seen that the intention was that the power should not be exercised, the words "is not intended to be exercised" might be sufficient to constitute an agreement that it never should be exercised, yet I think they ought not to be so construed unless we can see from the whole scope and context of the deed that that which is not the literal meaning must have been the intention of the parties. In my opinion, the whole scope and context of the deed prove it to be very improbable that such was the intention of the parties, and show, on the contrary, that the intention was to keep the old securities alive for the purpose of affording additional \*security. I asked the Solicitor-General whether [\*395] he could suggest that any harm would be done to the mortgagor by that construction, or whether the mortgagor could have had any object in making an express bargain that the old power should not be kept alive. I do not think that any answer was given to that question, and I cannot see that the mortgagor could have had any possible personal object in making a stipulation that the old power should not be kept alive. The old incumbrances clearly were kept alive so as to have precedence over the mesne incumbrancers, who, as it was not denied, might be foreclosed and practically shut out. There could, therefore, be no possible object in confining the power of sale of the new mortgagees so as to make it ineffectual as against subsequent incumbrancers, whom they had undoubtedly power to foreclose.

**Danby v. Coutts & Co.**

29 Ch. D. 500-516 (s. c. 54 L. J. Ch. 577; 52 L. T. 401; 33 W. R. 559).

*Power of Attorney.—Recital.—Control of Operative Part.*

The operative part of a power of attorney appointed X. and Y. to be the [500] attorneys of the plaintiff without in terms limiting the duration of their powers, but it was preceded by a recital that the plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence.

*Held*, that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the plaintiff's absence from this country.

During the plaintiff's absence from England, and again after his return, X. and Y., without his knowledge, and purporting to act under the power, which empowered them to borrow money on mortgage, borrowed moneys from a bank upon the security of charges on the plaintiff's property, which moneys they afterwards misappropriated. Upon the occasion of the first advance, the power was

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produced to the bankers and registered by their clerk, but it was not examined by them, nor were they aware that the plaintiff was in England when they made the second advance.

*Held*, that the charge given during the plaintiff's absence was valid, and that the charge given after his return was invalid.

In the month of June, 1879, the plaintiff, Mr. George Danby, a resident in Australia, became entitled to a life interest [\*501] with an \*ultimate remainder in fee (subject to certain intervening estates) in a large estate in Yorkshire known as the Swinton Park estate. In August, 1879, he arrived in England, and instructed Messrs. Frederick Searle Parker and William Searle Parker, of Bedford Row, to act as his solicitors.

In October, 1879, the plaintiff borrowed from the North British and Mercantile Insurance Company a considerable sum of money upon the security of his life estate and certain policies of assurance effected with that company. He shortly afterwards returned to Australia, but he came back again to England in July, 1880, and during this second visit to England he borrowed a further sum from the insurance company, and effected an insurance upon his life with them for £65,000. This insurance was not connected with the loan, but was a separate transaction, and the policy was the plaintiff's own property. Messrs. Parker received the moneys raised by the loan and had the custody of the policy.

In August, 1880, the plaintiff, being about to return again to Australia, gave to the Messrs. Parker a power of attorney. This instrument (the scope and extent of which was one of the questions in the action) was dated the 16th of August, 1880, and, after reciting that under the wills of William Danby and Anne Vernon Harcourt the plaintiff had recently become entitled to the Swinton Park estate, continued: "And whereas I am about to return to South Australia, and am desirous of appointing an attorney or attorneys to act for me during my absence from England in the care and management of the said estate, and dealing therewith either by way of sale, exchange, lease, mortgage, or otherwise, and to do all acts which may be necessary in consequence of my succeeding to the said estates, and in relation thereto, and generally to act for me in the management of, and dealings with, any property belonging to me during my absence from England." Then followed the operative part, whereby the plaintiff appointed F. S. Parker and W. S. Parker jointly and each of them separately

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to be his attorneys and attorney, and giving them large powers, in particular, to recover and receive the title deeds and documents relating to the estate, to manage the estate and negotiate and carry out the sale of it, to let it and receive the rents, and also to mortgage all or any “of the same premises.” There \* was [\*502] no mention in the operative part of the instrument of the duration of these powers ; and at the close there was a provision that no mortgagee or other person should be bound to inquire into the expediency or propriety of raising the money to be advanced by him, the plaintiff thereby undertaking to allow, ratify, and confirm everything which his attorneys or their substitute should do or suffer, or purport to do or suffer, by virtue of that power.

The plaintiff also instructed the Messrs. Parker to negotiate for the sale of the fee simple of the Swinton Park estate, and to receive the rents during his absence. On the 18th of August, 1880, he went back to Australia, and he did not return again to England until the 18th of June, 1882.

On the 13th of September, 1881, during the plaintiff’s absence from England, the Messrs. Parker, purporting to exercise the power of attorney on behalf of the plaintiff, borrowed money from Messrs. Coutts & Co. on the security of the plaintiff’s property, including the policy above mentioned.

Subsequently, while the plaintiff was in England, but the defendants being ignorant of that circumstance, Messrs. Parker, purporting to do so under the power of attorney on behalf of the plaintiff, borrowed further sums of money from the defendants. This was done by mortgages of 9th August and 29th September, 1882. Messrs. Parker ultimately absconded, having applied all the money to their own use.

The action was brought by the plaintiff against the bankers, to have it declared that the securities purporting to be given by the Messrs. Parker under the power were not binding on him.

Having heard the case argued, Mr. Justice KAY took time for consideration.

Feb. 27. KAY, J.:—

[512]

This action is occasioned by the fraud of the notorious Parkers, the solicitors who recently absconded, having extensively defrauded those who trusted them.

[His Lordship then stated the facts of the case, and the evidence upon which he considered it proved that the bankers had not the

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slightest suspicion that the Parkers were acting improperly, but considered the transactions to be perfectly *bonâ fide* for the benefit of the plaintiff, and he proceeded to discuss various grounds upon which it was suggested that the bank should be made liable. On this part of the case he concluded as follows:] —

[513] As I intimated during the argument I think that the plaintiff and defendants must be treated as perfectly innocent persons who \* have been injured by the fraud of third

[514] persons, and this obliges the Court to examine very critically the remaining questions in order to determine to what extent each must suffer by such fraud.

I take next in order the second question, whether or not the power of attorney of the 16th of August, 1880, ceased to be operative during the plaintiff's residence in England from the 18th of June, 1882, till the 30th of November in the same year. [His Lordship then stated the terms of the power to the effect above set forth, and continued:] —

The argument on the part of the defendants, while admitting that any one dealing with an attorney under such a power as that of the 16th of August, 1880, is bound to be cautious and to take care that the limits of the power are not exceeded, as was laid down in *Atwood v. Munnings*, 7 B. & C. 278 (31 R. R. 194), urged that this case comes within a supposed general rule that the operative part of an instrument cannot be controlled by a recital.

But I am of opinion that the rule was stated in that argument far too widely. The true rule is given in the language of Lord HATHERLEY in *Rooke v. Lord Kensington*, 2 K. & J. 769 (p. 720, *ante*), "that you cannot control clear words of conveyance by words of recital," but he goes on to point out that, "the exception will be found to be always, that general words are not within that description of clear words of conveyance which cannot be controlled by the recital."

And in *Jenner v. Jenner*, L. R. 1 Eq. 361, where the authorities are collected and examined, the same learned Judge acted upon that principle, relying upon Lord ELLENBOROUGH'S words in *Payler v. Homersharn*, 4 M. & S. 423 (16 R. R. 516), "the general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument truly you must have regard to all its parts, and most especially to the particular words of it."

No. 15.—*Danby v. Coutts & Co.*, 29 Ch. D. 514, 515.

That is a canon of construction more satisfactory and of larger application than the other, and it applies to the case before me.

The operative part of this instrument does not refer in any way to the duration of the power, therefore a statement in the recital or in any other part of it, that it was only intended to have effect \* during the donor's absence from England, would [\*515] not be repugnant to anything in the operative part. It is only a conclusion of law, that if such a power is silent as to its duration it must last during the donor's life, or until he revokes it.

I asked during the argument if the recital had contained a stipulation in the most express words that could be employed that the power should only be used during the donor's absence or other limited time, whether that could be disregarded, and the answer was that it could.

With that I am unable to agree. A power of attorney, like a release or a bond as in the case of *Lord Arlington v. Merricke*. 2 Wms. Saund. 813, seems to me precisely the kind of instrument which may be limited by a recital. And the only question upon which it appears to me there can be any reasonable doubt is whether that is the true effect of the recital in this power.

It is said that it was only inserted for the purpose of showing the motive for giving the power of attorney, but I can see no object in introducing the recital for that purpose. And after the best consideration I can give to the matter I come to the conclusion that the words "during my absence from England," which occur twice in this recital, are there used for expressing the limit of time during which the power was to be exercised.

This is evidently the view taken by the parties themselves, for during the stay of the plaintiff in this country in 1882, a new power was executed.

It was admitted of course that the fact that Messrs. Coutts & Co. had no notice of the plaintiff's return was immaterial.

This conclusion renders it unnecessary to express an opinion on the first question, whether the power authorised a mortgage by the attorneys of the policy for £32,500, which is a point of some difficulty.

The result so far is, that the equitable mortgage of the 13th of September, 1881, of the plaintiff's interest in the Swinton Park estate for £5000 is valid, but that the mortgages of the 9th of

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August, 1882, and the 29th of September, 1882, made while the plaintiff was in England, are invalid. . . .

#### ENGLISH NOTES.

In *Walsh v. Trevanion* (1850), 15 Q. B. 751, 19 L. J. Q. B. 458, Mr. Justice PATTERSON (in delivering the judgment of the Court) says: “Taking the rule of construction in the strongest and most favourable way for the defendants (who argued that the operative part was not controlled by the recitals), it cannot be pressed beyond this, that when the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of the words.”

In *Dawes v. Tredwell* (C. A. 1881), 18 Ch. D. 354, 45 L. T. 118, 23 W. R. 793, by a marriage settlement after reciting that it had been agreed that all property which during the coverture should devolve upon or vest in the husband in right of the wife should be settled, it was witnessed that it was thereby agreed by the parties thereto, and the husband covenanted with the trustees that if at any time during the coverture any property should so devolve or vest, the husband would execute and join and concur in executing all such conveyances as would effectually vest such property in the trustees. It was held by the Court of Appeal, reversing the decision of FRY, J., that the husband only was bound, and that the wife was not bound to bring into settlement property which had been given to her separate use. The MASTER OF THE ROLLS said: “This case, apart from the recital, is identical with *Ramsden v. Smith* (2 Drew. 298). Now the rule is, that a recital does not control the operative part of a deed where the operative part is clear. The recital here, as is usually the case, is in general terms; the operative part is in definite terms. There is another rule that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-matter. If, therefore, the covenant is clear, it cannot be controlled by the recital. Now it appears to me that the covenant is quite clear.”

Sir Howard Elphinstone, in his book on Interpretation of Deeds (p. 132), observes that the former part of the rule must be applied with some caution: “For” (he says), “bearing in mind that an agreement for the sale of property, accompanied by the payment of the purchase-money, operates as a conveyance in equity, it appears that a recital of

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an agreement for the sale of Blackacre and Whiteacre for a certain sum, followed by a conveyance, ‘in pursuance of the recited agreement and in consideration of the said sum of £—— (the receipt, &c.),’ of Blackacre only, will operate in equity as a conveyance of Whiteacre also. But a recital of an agreement for the sale of Blackacre for a certain sum, followed by a conveyance of Blackacre and Whiteacre for that sum, appears to fall within the rule.”

## AMERICAN NOTES.

*Boyd v. Petrie* is cited in Devlin on Deeds, sect. 398, and *Danby v. Coutts*, in 1 Jones on Real Property, sect. 249.

Recitals have never been much used in this country, and cases concerning their effect are rare. Mr. Jones adopts the principles of the Rule, but cites none but English cases to substantiate them, except one interesting case, *Miller v. Tunica County*, 67 Mississippi, 651, where the grantor, in a preamble reciting that he had given a parcel of land to the county as a site for a court-house, but the operative part of the deed not specifying the purpose, and conveying it for the use of the county, it was held that the preamble merely expressed the grantor’s motives, and did not create a condition that the land should be used for a court-house; and a New York case, *Huntington v. Havens*, 5 Johnson Chancery, 23, where KENT, Chancellor, observed, citing *Bath and Montague’s Case*, 3 Ch. Cas. 101: “If the recital in the deed be in any respect repugnant to this equity, as between the parties to this suit, it cannot be permitted to control the operation of the deed. This is a well settled rule of construction, and there never was a case in which a recital controlled the plain words of the granting part of a deed.”

Where a deed of land is made to one as assignee, and recites that it was executed “for and in consideration of the conditions of the assignment made this day for the benefit of the creditors” of the grantor, the recital is conclusive that the grantee took in trust, and not as a purchaser, and cannot be contradicted by parol evidence of an intent to make an absolute conveyance in payment of the debt due the grantee and others. *McDermith v. Voorhees*, 16 Colorado, 402; 25 Am. St. Rep. 286.

A deed by a father to his infant daughter and her heirs, reciting that the estate is to be held in trust by her grandfather until she becomes of age, passes title directly to the daughter upon delivery of the deed, and no title or trust vests in the grandfather. *Annis v. Wilson*, 15 Colorado, 236.

In *Grueber v. Lindenmeier*, 42 Minnesota, 99, the language of the grant was: “Are to have the free use and privilege—that is to say, being boss—of a certain real estate,” &c., “deeded and executed,” on a certain other day, “to the said parties of the first part, during their natural lives.” *Hold*, a life estate, not limited by the recital “being boss.”

A deed, with sufficient covenants to pass the estate of the grantor, is not limited by a recital that it is intended to convey absolutely all the estate of his wife, named as a grantor, but who has only an inchoate dower interest. *Davenport v. Gwilliams*, 133 Indiana, 142; 22 Lawyers’ Rep. Annotated, 244.

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No. 16. — **Kendal v. Micfeild, Barnardiston, 46, 47. — Rule.**

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**No. 16. — KENDAL v. MICFEILD.**

(CH. 1740.)

**No. 17. — GOODTITLE d. DODWELL v. GIBBS.**

(K. B. 1826.)

## RULE.

A DEED of conveyance may be effectual without a *habendum*. Where the grantee is named in the *habendum* only, he takes the estate as limited by that clause. But if the grant preceding the *habendum*, and the *habendum* itself, both contain express limitations of the estate, the rule is that the estate limited to the grantee may be extended or explained, but not abridged, by the *habendum*.

**Kendal v. Micfeild.**

Barnardiston, 46-50.

*Conveyance. — Habendum.*

[46] Sir Henry Hern had a rent-charge of £166 per annum granted to him and his assigns for three lives. He and his lady joined in a mortgage of this rent-charge to Joseph Kendal. In the premises of this deed of mortgage, the rent was granted to him, his executors, administrators, and assigns, to have and to hold to him, his heirs and assigns during the three lives, for which this rent was originally granted; upon this special trust, that he, his executors, administrators, and assigns, do and shall enjoy £100 per annum out of it to their own proper use, till the sum contained in the mortgage was satisfied, if the three lives should last so long. Kendal made his will and thereby appointed the plaintiff his executor; but to this will there was no subscribing witnesses.

[\*47] \* The present bill was brought by the plaintiff against the heir-at-law of Kendal, and against several others, in order to have the benefit of so much of the rent-charge as Kendal, the mortgagee, was entitled to.

When this cause came on to be heard before his Honour, he thought it was a point that deserved to be something considered of;

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accordingly ordered it to stand over for judgment; and now he was pleased to deliver his opinion in it. He said there were two questions for his consideration; the one, what sort of a legal estate the mortgagee had in this rent-charge?—namely, whether it was such an estate as would go to his heirs for the three lives that have been mentioned; or, whether it was such an estate as during those three lives would go to his executors? And supposing, for argument's sake, the legal estate would go to his heirs, the next question is, whether the trust of it does not belong to his executors? What makes this a very particular case is, that this is an estate *pur autre vie*. And the first point of the case is so new that, was it not for the second, he should have thought it proper to have had the opinion of a Court of law upon it. For though the rules are fully established how far the *habendum* of a deed shall vary and explain the premises of it, yet when one comes to apply the present case to those rules, there arises a good deal of difficulty. And his Honour said, he could not find a single authority which would come up to the first point of the present case. The general rules are, that the office of the *habendum* is, to explain, limit, and declare the *quantum* of the estate which is to pass by the deed. It has never been disputed but that it will carry the limitation of the estate farther than the premises of the deed did. If a man gives an estate to A. for life, *habendum* to him and his heirs, a fee-simple clearly passes. On the other hand, it is clear that the *habendum* never abridges the estate granted by the premises of the deed; it may indeed vary and alter it. \*As if a [\*48] man grants an estate to A. and B., to have and to hold to A. for life, the remainder to B., the premises of the deed in that case will be controlled by the *habendum*. So if an estate is granted to a man, and to the heirs of his body, *habendum* to him and his heirs; this is a fee simple. It has been said in some books, that this is only an estate tail, with a remainder in fee; but it is difficult to maintain that opinion; and his Honour thought that it was not law. So far the rules relating to *habendums* are plain and clear; but the particular nature of the present case is such, that a grant of this kind to a man and his executors is the same as a grant to a man and his heirs; for in both these cases the heirs and executors do not take as representatives to the party, but as special occupants; and therefore it has been held, that if a grant of an estate is made to a man and his heirs for three lives, he may grant

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it to another, and his executors during those lives. So on the other hand, if such estate is granted to a man and his executors for three lives, he may grant it to another and his heirs during those lives. And as this is so, that it is considered as the same kind of estate, whether a grant of that sort is made to a man and his heirs, or whether it is made to a man and his executors; it follows from thence, that when one of these limitations is in the premises of the deed, and the other of these limitations is in the *habendum*, the *habendum* shall take place. For instance, if in the premises of the deed the grant of the estate *pur autre vie* is to A. and his executors during the life of B., *habendum* to A. and his heirs during that life; the heirs in that case shall have the benefit of the estate. On the other hand, if the grant of such estate is to A. and his heirs during the life in being, *habendum* to A. and his executors during that life, the executors shall have the benefit of it; and the reason for that is, that the *habendum* in that case does not attempt to give a less or a larger estate than was contained in the premises, but is merely explanatory. But then a difficulty

arises, in the present case, from this being the case of a [\* 49] rent; and it \* is clear that before the Statute of Frauds and

Perjuries no grant of a rent *pur autre vie* could be good any longer than the party himself lived to whom the grant was made. And though that grant was made to a man and his heirs during the life of another, or to a man and his executors during such life, neither the heir nor executor could have any benefit from such grant. This appears from 3 Cro. 901, and several other authorities; and the reason given for this was, that a rent was such a thing as did not lie in occupancy; so that it was certain, that there could not be a general occupancy of it; nor would the common law admit, in that case, even of a special occupancy. But then the question is, whether the Statute of Frauds and Perjuries has not altered the law in this respect? and whether a rent is not within the relief of that Act of Parliament, as well as any other sort of inheritance? And his Honour was of opinion that it was. The statute intended to make a general alteration with regard to all sorts of estates that were granted *pur autre vie*; and a rent-charge is as much within the intention of that Act of Parliament as any other hereditament. This difficulty then, concerning this case being that of a rent, may quite be laid aside; and then the matter concerning the legal estate depends upon that which he had before mentioned, namely,

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whether the *habendum* in this case ought not to take place? And he was of opinion that it ought, for the reason that he had before given; and consequently, that the legal estate in this rent belonged to the heir-at-law. But then the next question is, whether, within the meaning of the trust of this deed, the executor, Kendal, is not entitled to the benefit of that? And his Honour was of opinion that he was. It is expressly declared by the deed, that the mortgage was made upon the special trust, that the mortgagor, his executors, administrators, and assigns, should enjoy the benefit of £100 per annum, part of the rent-charge, to their own use, till the mortgage was satisfied, if the three lives continued so long. The only thing that makes the least difficulty in  
 \* this part of the case is, that it is pretty hard to conceive [\* 50] how a man and his heirs should be trustees for a man and his executors; but this is the case of every mortgage that is made in fee. And so his Honour was pleased to decree accordingly.

**Goodtitle d. Dodwell v. Gibbs.**

5 Barn. &amp; Cress. 709–720 (29 R. R. 366).

*Lease. — Habendum. — Construction.*

By lease and release M. H. conveyed to J. W., and to his heirs and [709] assigns, certain freehold and copyhold premises, to hold the same unto the said J. W., his heirs and assigns, from and immediately after the death of M. H., to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned. Held, that, by the premises, an immediate estate of freehold was given to J. W., and that the *habendum* had not the effect of rendering the deed void as giving a freehold *in futuro*.

Ejectment for lands in the parish of White Waltham, in the county of Berks. Plea, the general issue. At the trial before BURROUGH, J., at the Berkshire Summer Assizes, 1825, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case: Martha Hatton in her lifetime, and at the time of the making of the surrender to the use of her  
 \* will, and making such will and executing the deeds [\* 710] hereafter mentioned, was seised of estates of inheritance in fee simple in the premises in question, consisting of a messuage and buildings, and about five acres and a half of freehold land, and three closes of land which are copyhold, situate as aforesaid, and being so seised, she, on the 9th of February, 1763,

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surrendered the said copyhold premises to and for such uses, intents, and purposes, and to and for the benefit of such person and persons, and his, her, and their heirs, as the said Martha Hatton by her last will and testament in writing already had or at any time thereafter should limit, direct, appoint, or give the same. Martha Hatton duly executed a lease and release of the said freehold premises as follows: The lease without date, and the release bearing date the 29th day of July, 1768, and made between Martha Hatton of the one part, and John Westbrook the elder of the other part, and by the latter indenture it was witnessed that for the settling and assuring the messuages or tenements, lands, hereditaments, and premises thereafter mentioned, to and for the several uses, intents, and purposes thereafter particularly mentioned, the said Martha Hatton for and in consideration of the sum of ten shillings, &c., paid by the said John Westbrook the elder, the receipt whereof was thereby acknowledged, and for other causes and considerations thereunto moving, did grant, bargain, sell, alien, release, and confirm unto the said John Westbrook the elder (in his actual possession then being by virtue of a bargain and sale to him thereof made for one whole year, by indenture bearing date the day next before the day of the date of the indenture of release, and by force of the statute [\*711] made for \*transferring uses into possession), and to his heirs and assigns, divers hereditaments, including by description the freehold and copyhold premises in question, to hold the same unto the said John Westbrook the elder, his heirs and assigns, from and immediately after the decease of the said Martha Hatton, to, for, and upon the several uses, ends, intents, and purposes thereafter mentioned, expressed, and declared of and concerning the same; that is to say, to the use of the said John Westbrook the elder (from and immediately after the decease of the said Martha Hatton) and Anna his wife, and their assigns for and during the term of their natural lives, and the life of the longer liver of them; and from and after the decease of the survivor of them the said John Westbrook the elder and Anna his wife, to the use and behoof of John Westbrook the younger, son of the said John Westbrook the elder, and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after the decease of the said John Westbrook the younger, to the use and behoof of the first and other

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sons of the body of the said John Westbrook the younger, lawfully to be begotten severally and successively, and the heirs male of the body of such first and other sons lawfully issuing; and for want of such issue, to the use and behoof of Hatton, the daughter of the said John Westbrook the elder, and Anna his wife, her heirs and assigns for ever. And the said Martha Hatton covenanted for further assurance of the said freehold and copyhold premises to the uses aforesaid, but no surrender was made of the copyhold lands to the uses aforesaid. The lessor of the plaintiff was the daughter of Hatton (the daughter of John Westbrook and Anna his wife), by Henry Dodwell, her husband.

\* John Westbrook the elder and John Westbrook the [\*712] younger suffered a recovery in 1774; but it was admitted that it did not bar the remainder given to Hatton Westbrook by the release of 1768, the only question raised being as to the validity of that deed. The case was argued on a former day in this term by

Coote for the lessor of the plaintiff.—The question turns upon the *habendum* in the deed bearing date the 29th of July, 1768. It is contended that the *habendum* gave an estate of freehold *in futuro*, and is therefore void. In the granting part, the estate given to J. W. the elder is express and certain; it is to him, his heirs and assigns; then follows the *habendum*, “to hold the same unto the said J. W. the elder, his heirs and assigns, from and immediately after the decease of the said Martha Hatton, to, for, and upon the several uses, ends, intents, and purposes hereinafter mentioned,” &c. Now the *habendum* may very fairly be read with a stop after the words “heirs and assigns.” If so, the grant would be immediate, although certain uses might arise *in futuro*. But an *habendum* is not an essential part of a deed (Shep. Touch. 76), and if it is repugnant to the granting part it must be rejected. There are, indeed, cases apparently warranting a different conclusion; but upon examination it will be found that they are distinguishable from the present case. The rule is this: if an estate be granted in any premises, and that grant is express and certain, the *habendum* shall not vitiate it, for *utile per inutile non vitiatur*. But if the estate granted in the

\* premises be not express, but arising by implication of [\*713] law, there a void *habendum*, or one differing materially from the grant, may defeat it. Shep. Touch. 112; *Baldwin's*

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*Case*, 2 Co. Rep. 23; *Stukeley v. Butler*, Hob. 168; and *Carter v. Madgwick*, 3 Lev. 339, which last case is expressly in point for the present lessor of the plaintiff. It is true that in *Buckler's Case*, 2 Co. Rep. 55, where tenant for life, having made a lease for years, granted *tenementum prædicta* to C. *habendum*, from the feast of the Nativity of Saint John the Baptist next following, for life, the grant was held void, for that an estate of freehold cannot commence *in futuro*. But there it was observed that the *habendum* was not contrary to the premises, for no certain estate was contained in the premises, but generally the land given and granted, which might be qualified by the *habendum* to an estate for years or at will. And in *Hogg v. Cross*, Cro. Eliz. 254, where an *habendum* for an estate of freehold *in futuro* was held to make the grant void, the Court proceeded upon the ground that it was the purport of the deed that nothing should pass till after the death of the grantor, and that nothing should pass but according to the intent; which rule has been adopted in many modern cases. *Roe v. Tranmer*, 2 Wills. 75; *Osmond v. Sheafe*, 3 Lev. 370. In *Underhay v. Underhay* (cited in Hob. 171, Cro. Eliz. 269), one, having leased his land to three for their lives, granted the reversion *habendum* to the grantee for his life, and then added, "which said estate for life is to begin after the death of the three first lessees," and that was adjudged a good estate in reversion for life. Thus, then, it appears that there is no [\*714] \* objection to the granting part of this deed by the common law; secondly, there is no objection to the limitation of uses. The greatest effect produced by the Statute of Uses is, that by its operation the legal estate of freehold passes *in futuro*; for there is no doubt that a limitation by way of springing use is good, provided the event whereupon the use is to arise is to happen within what the law considers a reasonable time; that is, a life or lives in being and twenty-one years after, which appears to have been the case in *Davis v. Sjeed*, 2 Salk. 676, *Roe v. Tranmer*, *Osman v. Sheafe*, and *Pybus v. Mitford*, 1 Ventr. 372.

Preston, *contra*.—If the objection that the conveyance is of a freehold *in futuro*, and therefore void, be well founded, the uses cannot arise, *debile fundamentum fallit opus*. In all the cases which have been cited, it was held that the conveyance operated as a covenant to stand seised. The only case in point cited for

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the plaintiff was *Carter v. Mudgwick*; but that is not found in any other reporter but Levinz, although nearly all the other cases in that book are: it does not appear to have been ever quoted or relied upon by any Judge, and is contrary to every principle of law, and every rule applied to the exposition of deeds.<sup>1</sup> The case was thus: "Parker seised in fee, by indenture between him and J. B. his grandson, the lessor, in consideration of affection and £s., granted, bargained, and sold to the lessor and his heirs the tenements in question, *habendum*, immediately after his death, to the lessor and the heirs male of his body," with divers remainders over; and the Court, by their judgment, that the estate passed \* immediately by the premises, made that a [\*715] fee which was intended to be an estate tail, and made that a grant of the estate immediately which was intended to be a grant *in futuro*, reserving a life estate to the grantor. It might have been good as a covenant to stand seised; but the Court did not avail themselves of that doctrine, as in *Osmun v. Sheafe*. The *habendum* certainly is not essential to a deed; but when inserted, it is most essential, unless it be absolutely repugnant to the granting part. *Stukeley v. Butler*, and the other cases in which it has been held that if there be a grant of an express estate, followed by an *habendum* repugnant to that grant, the *habendum* is void, may be admitted; but the question has always turned upon the repugnancy. Thus where a grant is to A. and his heirs, *habendum* for the life of A., that is clearly repugnant. Plowd. 153. [BAYLEY, J.—If the deed be read with a stop after "habendum unto J. W., his heirs and assigns," then nothing is postponed but the use; the seisin is given immediately.] The deed must be read as if it had been made before the Statute of Uses. Putting the uses out of view, the conveyance is to A. and his heirs, *habendum in futuro*. The declaration of uses does not commence until after the *habendum* is closed. *Braine v. Deakon*, Preston on Estates, 229. It is admitted that the *habendum* may control the grant where the estate is not express; it may be a grant in fee or in tail, *in praesenti* or *in futuro*, and that is to be explained by the *habendum*. 2 Roll. Abr. Grant, p. 68.<sup>2</sup> Here the estate granted is not express; it is to A. and his heirs;

<sup>1</sup> It is found in Com. Dig. tit. Fait (E 10). may be restrained by the *habendum* to the heirs of the body. *Thurman's Case*, 2 Roll.

<sup>2</sup> Thus, a grant to "A. and his heirs" Abr. Grant, K. pl. 24.

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[\*716] but they were intended \* to take in the particular mode pointed out by the *habendum*. *Cur. adv. vult.*

ABBOTT, Ch. J., now delivered the judgment of the Court.

This came before the Court upon a special case, which was argued during the present term. The only question raised was upon the validity of a deed executed by Martha Hatton, as to the freehold tenements therein mentioned. After stating the facts of the case, the LORD CHIEF JUSTICE proceeded as follows:—

The objection made to the validity of the deed was that it is a grant of a freehold to commence *in futuro*; and if this be its true effect it is undoubtedly void. The question whether this be its true effect depends upon the operation of the *habendum*. If the *habendum* is to be considered as the operating part of the deed, the deed will be an attempt to convey a freehold *in futuro*. If the part called the premises be the operating part, and the *habendum* can be rejected, or considered only as qualifying the premises, a present freehold will pass, and the deed will be good. Many cases were quoted in the argument, to which it is not necessary to advert again. The distinction as to the effect of the *habendum* between deeds in which the premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest, was noted and relied upon, and it was contended that in the deed in question the premises do mention an estate and interest (as we think they do), and the case of *Carter v. Madgwick*, 3 Lev. 339, was quoted as being directly in point to the present case.

[\*717] \* The distinction to which I allude is this: If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law, but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and, consequently, no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with

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either, the *habendum* shall be rejected, and the deed stand good upon the premises.

This was done in *Carter v. Madgwick*; and the very learned gentleman who argued for the defendant, and against the validity of the deed, observed that that case was a solitary decision, never quoted or relied upon, and contrary to law, as it gave an immediate estate to the grantee, whereas the grantor manifestly intended to reserve a life estate to himself. Perhaps so much of the opinion of the Court as regards the exclusion of a life estate in the grantor may be found to have been expressed, without sufficiently adverting to the operation of the Statute of Uses, and to a construction that might have been given to the deed so as to allow a life estate. The grantor had, in fact, enjoyed, during life, in that case as in the present. But the case of *Carter v. Madgwick* is not a solitary decision. The case of \**Jarman* [\*718] *v. Orchard*, Skin. 528, Salk. 346, Show. P. C. 199, is to the same effect. In that case, Thomas Nicholas, being possessed of a barn, cottage, and land, as assignee of a lease for one thousand years, did, by indenture reciting the lease, and expressed to be in consideration of natural love to his granddaughter, and for other good causes and considerations, grant, assign, and set over to his granddaughter Mary, her executors, administrators, and assigns, all the said cottage, barn, and lands, and all other the premises thereinbefore recited, together with the recited lease, and all writings and evidences touching the premises, *habendum* the said cottage, &c., to the said Mary, her executors, administrators, and assigns, from and after the decease of the said Thomas Nicholas and his wife, for the residue of the term, subject to the rent and covenants. Now if this deed was considered as an assignment to commence and take effect after the death of T. Nicholas, the deed would be void, as in law assigning nothing, the life interest of T. Nicholas being deemed in law to be of greater value and longer duration than any term of years. And it was contended that the deed could only be construed as such an assignment, because it appeared that T. N. did not mean to part with his interest in the term during his own life. The question arose after the death of T. N. In the King's Bench judgment was given against the validity of the deed; but that judgment was reversed in the Exchequer Chamber, and the reversal affirmed in Parliament. And the ground of the reversal was, that

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the entire residue of the term passed by the premises of the deed, and the *habendum* was void.

[\*719] \* In the present case, we think an immediate freehold passed by the premises in the deed, and consequently the objection that the deed passed only a freehold to commence *in futuro* cannot prevail. Mary Hatton, the releasor, is now dead, and therefore, perhaps, it may not be necessary to decide whether any use vested in her for her life. We think, however, that the use did vest in her for her life, and so the deed will stand good in all its parts, and effect be given to the intention of the parties, which ought to be done, if by law it may. The release is expressed to be made in consideration of ten shillings paid by John Westbrook the elder, and other causes and considerations. This John Westbrook had married a cousin of Martha Hatton, and the deed was evidently intended as a family settlement. Now if the consideration of ten shillings had not been expressed, and the deed had contained no *habendum*, we think the use of the entire fee would have resulted to M. H. by implication and presumption of law. And upon supposition of the absence of this consideration, and the insertion of the *habendum*, we think the effect of the *habendum* would be partially to rebut the implication, and to narrow the use to an estate for life in M. H. And if the mention of this consideration of ten shillings should have the effect of preventing a resulting use to M. H., and, in the absence of an *habendum*, should vest the use of the entire fee in J. W. (a point upon which we think it unnecessary to give an opinion), still this use would only arise by implication and presumption of law, grounded on the pecuniary consideration, and would not be a use expressed in the deed. And this being so, we think the *habendum* might have, in this view of the case also, the effect

[\*720] of partially rebutting the implication, by \*showing the intention of the parties to be that the use should not vest in J. W. until after the death of M. H., and this would be good in law, because a use may be limited *in futuro*; and then the use of so much of the estate as was not limited or declared by the deed might, in our opinion, result to and vest in M. H. And upon either of these constructions effect will be given to the whole deed, and to the intention of the parties.

*Postea to the plaintiff.*

## ENGLISII NOTES.

On a subject so technical, it may be permitted to cite the propositions which Mr. Challis (Law of Real Property, p. 333) has considered to be established by a careful examination of the authorities. They are as follows:—

“(1) The *habendum* may enlarge an estate expressly contained in the premises, and capable of taking effect, but may not abridge or make void any such estate. (Co. Litt. 299 a; *Lilley v. Whitney*, Dy. 272 a, pl. 30; *Carter v. Madgwick*, 3 Lev. 339; *Germain v. Orchard*, 1 Salk. 346, 3 Salk. 222; *Goodtitle v. Gibbs*, 5 B. & C. 709 [*ante*, p. 779]; *Boddington v. Robinson*, L. R. 10 Ex. 270.)

“(2) Where an estate in the premises arises, not expressly, but by mere implication, an express estate in the *habendum*, if repugnant, may abridge the implication of the premises. (*Buckler’s Case*, 2 Co. Rep. 55; *Hogg v. Cross*, Cro. Eliz. 254, Co. Litt. 183 a; *ibid.* 190 b.)

“(3) Where, under the old law, an estate was contained in the premises which could not take effect without livery of seisin, and such livery was not duly made, then, if an estate was contained in the *habendum* which could take effect without livery of seisin, the latter estate would take effect by mere delivery of the deed, though the former would not. (*Baldwin’s Case*, 2 C. Rep. 23.)

“(4) In certain cases the estates limited in the premises and the *habendum* respectively, though not precisely identical, are so far *ejusdem generis*, that it is held to be compatible with the due intent of both that a modification introduced by the *habendum* shall be permitted to take effect.”

## AMERICAN NOTES.

*Goodtitle v. Gibbs* is much cited in Jones on Real Property, who says: “It is not necessary therefore that there should be any *habendum* clause,” and approved by Kent, Ch. J., in *Jackson v. Myers*, 3 Johnson (N. Y.), 395.

If the granting clause is silent or ambiguous as to the estate to be granted, the *habendum* must be resorted to in order to ascertain the nature and extent of the estate. *Mitchell v. Wilson*, 3 Cranch (U. S. Circ. Ct.), 242; *Havens v. Seashore Land Co.*, 47 New Jersey Equity, 365; *Riggan v. Lore*, 72 Illinois, 553; *Bodine’s Adm’rs v. Arthur*, 91 Kentucky, 53. So where a granting clause was to a woman “and her children and assigns,” *habendum* to her “and her heirs and assigns,” she took a fee. *R’nes v. Mansfield*, 96 Missouri, 393. See *Berry v. Billings*, 44 Maine, 416; 69 Am. Dec. 107; *Montgomery v. Sturdivant*, 41 California, 290; *Kelly v. Hill*, — Maryland, —. When not clearly contradictory of the premises, the *habendum* may be resorted to equally with other parts of the deed to ascertain the grantor’s intention. *Henderson v. Mack*, 82 Kentucky, 379.

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If no *habendum*, the grantee takes the estate according to the premises. *Major v. Buckley*, 51 Missouri, 227; *Keaworthy v. Tullis*, 3 Indiana, 96; *Fulbright v. Yoder*, 113 North Carolina, 456.

If the grantee is named only in the *habendum*, that will be operative. *Berry v. Billings*, 44 Maine, 416; 69 Am. Dec. 107. An estate to a man in the premises may be enlarged to one to him and his wife and their heirs and assigns by the *habendum*. *McLeod v. Tarrant*, 39 South Carolina, 271; 20 Lawyers' Rep. Annotated, 846.

"The *habendum* may explain, enlarge, or qualify, but cannot contradict or defeat the estate granted by the premises." Jones Real Property, sect. 563; *Warn v. Brown*, 102 Penn. State, 347; *Breed v. Osborne*, 113 Massachusetts, 318; *Chaffee v. Dodge*, 2 Root (Connecticut), 205; *Thompson v. Carl*, 51 Vermont, 408; *Rupert v. Penner*, 35 Nebraska, 587; 17 Lawyers' Rep. Annotated, 824.

If *habendum* is inconsistent with the premises, the latter controls. *Winter v. Gorsuch*, 51 Maryland, 180; *Riggin v. Love*, 72 Illinois, 553; *Faire v. Daley*, 93 California, 661; *Karchner v. Hoy*, 151 Penn. State, 383; *Bodine's Adm'r v. Arthur*, 91 Kentucky, 53 (because "words of conveyance are necessary to the passage of the title, and the *habendum* is not ordinarily an indispensable part of the deed;" and because deeds are most strongly construed against the grantor).

*Habendum* repugnant to the premises is void. *Smith v. Smith*, 71 Michigan, 633; *Harens v. Seashore Land Co.*, *supra*; *Ratliffe v. Marrs*, 87 Kentucky, 26; *Hafner v. Irwin*, 4 Devereux & Battle (Nor. Car.), 433; 34 Am. Dec. 390; *Robinson v. Payne*, 58 Mississippi, 690; *Huntington v. Lyman*, 138 Massachusetts, 205; *Pynchon v. Stearns*, 11 Metcalf (Mass.), 312; 45 Am. Dec. 410; *Budd v. Brooke*, 3 Gill (Maryland), 198; 43 Am. Dec. 321; *Nightingale v. Hidden*, 7 Rhode Island, 115; *Flagg v. Eames*, 40 Vermont, 64; 94 Am. Dec. 393; *Warn v. Brown*, 102 Penn. State, 347; *Green Bay, &c. Canal Co. v. Hewett*, 55 Wisconsin, 105; 42 Am. Rep. 701; *Smith v. Smith*, 71 Michigan, 633. As when the *habendum* names a different grantee. *Hafner v. Irwin*, 4 Devereux & Battle (Nor. Car.), 433; 34 Am. Dec. 390.

Limitation in the *habendum* conflicting with the premises must be rejected. *Hafner v. Irwin*, *supra*; *Budd v. Brooke*, 3 Gill (Maryland), 198; 43 Am. Dec. 321; *Brown v. Manter*, 21 New Hampshire, 528; 43 Am. Dec. 223 (citing *Goodtitle v. Gibbs*); *Berry v. Billings*, 44 Maine, 416; 69 Am. Dec. 107; *Flagg v. Eames*, 40 Vermont, 116; 94 Am. Dec. 393.

Where a grant is to a city absolutely, a condition is not created by *habendum* "as and for a street, to be kept as a public highway." *Kilpatrick v. Mayor, &c.*, 81 Maryland, 179; 27 Lawyers' Rep. Annotated, 643.

*Habendum* and premises must be reconciled if possible. *Wager v. Wager*, 1 Sergeant & Rawle (Penn.), 374. "One of the most important rules in the construction of deeds is to so construe them that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. It never could be a man's intent to contradict himself; therefore we should lean to such a construction as reconciles the different parts, and reject a construction

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which leads to a contradiction. The premises of a deed are often expressed in general terms, admitting of various explanations in a subsequent part of the deed. Such explanations are usually found in the *habendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, by the premises, in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises.”

If the premises and the *habendum* are irreconcileable, that will control which most precisely defines the estate which the grantor apparently intended to convey. Thus where an old husband, providing for a young wife and one child, granted to the wife in fee, *habendum* while she should remain his widow, with reverter at her decease to the grantor and his heirs, it was held that the *habendum* controlled, the Court observing that it would be a presumption “too violent to be entertained for a moment to suppose that he intended this estate to go to a second husband of his wife, after her death, to the exclusion of his own child.” *Whitby v. Duffy*, 135 Penn. State, 620.

Mr. Jones observes (Real Property, sect. 568) : “The inclination of many Courts at the present day is to regard the whole instrument without regard to formal divisions. The deed is so construed, if possible, as to give effect to all its provisions, and thus to effectuate the intent of the parties. When an instrument is informal, the interest transferred by it depends not so much upon the words and phrases it contains, as upon the intention of the parties as indicated by the whole instrument. This view is expressed by the Supreme Court of California in a recent case (*Faire v. Daley*, 93 California, 661) : ‘The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but for the purpose of ascertaining this intention, the entire instrument, the *habendum* as well as the premises, is to be considered; and if it appears from such consideration that the grantor intended by the *habendum* clause to restrict or limit or enlarge the estate named in the granting clause, the *habendum* will prevail over the granting clause.’” Citing *Bartholomew v. Muzzy*, 61 Connecticut, 387; *Mittel v. Karl*, 133 Illinois, 65; *Carson v. McCaslin*, 60 Indiana, 37; *Henderson v. Mack*, 82 Kentucky, 379; *Higgins v. Wasgatt*, 34 Maine, 305; *Breed v. Osborne*, 113 Massachusetts, 318; *Grueber v. Lindenmeier*, 42 Minnesota, 99; *Beebe v. McKenzie*, 19 Oregon, 296; *Dreibach v. Surfass*, 126 Penn. State, 32; *Fogarty v. Stock*, 86 Tennessee, 610; *Hancock v. Butler*, 21 Texas, 804.

Thus in *Carson v. McCaslin*, *supra*, the premises ran to a husband, “his heirs and assigns forever,” *habendum* to him “during his natural life, and to” his wife, “if she be living at” his death, “and to her heirs and assigns in fee simple, and if she be not living at” his death, “then to the heirs of the” husband “forever.” *Held*, that the husband’s estate terminated at his death leaving his wife surviving, and the whole estate vested in her, and on her death intestate the lands descended to her children.

Premises to “Y., his heirs and assigns;” *habendum* to Y., “his heirs and assigns forever, with covenant of general warranty during his natural life, and after his death to go to and belong absolutely to Belle Mack, she paying

**No. 18.—Crossing v. Scudamore, 1 Ventris, 137.—Rule.**

the unpaid purchase-money as aforesaid:” held, a life estate in Y. with remainder in Belle Mack. The Court said: “The office of the *habendum* clause in a deed is to limit and define the estate granted, and while as a general rule it must give way to the granting words of the deed, when clearly contradictory of them, yet it should certainly be resorted to equally with the balance of the instrument to arrive at the intention of the maker, which must govern when ascertainable. When the intention does not appear, then the words of grant should govern; but if the intention is apparent, then it should govern. This rule, we believe, is consistent with reason and upheld by authority. If the language of the deed admits of more than one construction, then the intention of the grantor, gathered from the whole instrument, should be regarded:” *Henderson v. Mack*, 82 Kentucky, 379.

**No. 18.—CROSSING v. SCUDAMORE.**

(1670.)

**No. 19.—GOODTITLE d. EDWARDS v. BAILEY.**

(1777.)

**RULE.**

IF, owing to some rule of law, a deed fails to take effect in the manner intended, it will, if possible, be construed so as to take effect in some other manner which will carry the expressed general intention of the parties into effect. Elphinstone Interp. of Deeds, Rule 9.

**Crossing v. Scudamore.**

1 Ventris, 137-142.

***Conveyance. — Bargain and Sale. — Covenant to stand seised.***

Where a deed expressed as a bargain and sale could not take effect as such for want of a money consideration, the Court held that the land should pass by way of covenant to stand seised to the use of the grantee.

[137] In trespass *quare clausum fregit* the defendant pleaded that the place where, &c., was the freehold of Sir Thomas Hooks, and that by his command he entered.

The plaintiff traverseth that it was the freehold of Sir T. H.; and thereupon this special verdict was found.

That Nicholas Heale was seised in fee, and that, 16 Dec., 1640, he made a deed to Jane Heale, enrolled within six months, by

No. 18. — *Crossing v. Scudamore, 1 Ventris, 137, 138.*

which the said Nicholas did (for and in consideration of natural love, augmentation of her portion, and preferment of her in marriage, and other good and valuable considerations) give, grant, bargain, sell, alien, enfeoff, and confirm unto the said Jane Heale and her heirs. Then they found there was a covenant \* that the said Jane Heale should, after due execution, &c., [\* 138] quietly enjoy, &c., and also a special clause of warranty, and that the deed was enrolled within six months, and that there was no other consideration of making the indenture than what was expressed. And if it were sufficient to convey the premises to the said Jane, they found for the plaintiff; if not, for the defendant.

And it was argued by Winnington for the plaintiff. He agreed that it could not take effect as a bargain and sale, because no money was paid, but argued that the deed should enure as a covenant to stand seised.

It is a ground in the law that the intention of the parties ought to guide the raising of uses, and the construction how they shall enure: Co. Lit. 49; Roll. 2d part, 789; and to give the effect the words shall be disposed to other construction than what otherwise they would import. As if a man demises, grants, and to farm lets certain lands in consideration of money, and the deed is enrolled; this is a good bargain and sale. So if a man covenants in consideration of money to stand seised to the use of his son. 8 Co. Rep. 93, *Fox's Case*; 2 Roll. 789. It is said, *nota per Curiam*, if it appears that it was the intent of him that made the deed to pass the estate, according to rules of law, it shall pass though there be not formal words.

Again, the consideration expressed in this deed is purely applicable to a covenant to stand seised, and a deed shall enure upon the consideration expressed rather than upon one that is implied. As in *Bedell's Case*, 7 Co. Rep. 40. If the father, in consideration of £100 paid, covenants to stand seised to the use of his son, and the deed is not enrolled, nothing shall pass; but where there are two considerations expressed, there the use may arise upon either. As if the father, in consideration of blood and £100 paid by the son, covenants to stand seised, &c., and the deed is not enrolled; yet the use shall arise, as upon a covenant to stand seised. Pl. Com. 305. And so it was adjudged between *Watson* and *Dicks* in the Common Pleas, 1656. The father by deed, in consideration of

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love and £100 paid by the son, conveyed land to him, with a letter of attorney in the deed to make livery; in that case the son hath his election to take by the enrolment or livery, which shall be first executed. 2 Roll. 787, pl. 25.

But it hath been objected here that there is a clause of warranty in the deed, which shows that the parties intended a conveyance at the common law; for if it enure by way of covenant to stand seised, the warrant can have no effect but to rebut. Also there is a covenant for quiet enjoyment after sealing and delivery [\*139] of the deed, and due execution of the same; \* which shows the parties had a prospect of executing it by livery, &c.

To which he answered, that such remote implications as those shall never make a deed void against an express consideration, upon the which a use may arise. 'Tis true, if there had been a letter of attorney in the deed, it might have been void, unless livery had followed. As if the father by deed grants land to the son, and a letter of attorney in it to make livery; if none be made, nothing passes. Co. Lit. 40 a. The authorities which have been cited on the other side are, first, *Pitfield* and *Pierce's* case, 2 Roll. 789, where the father by deed-poll, in consideration of blood, did give, grant, &c. (as in our case), to his son, *habendum* after his decease, and a proviso in it, that the son should pay a rent during the father's life.

It was adjudged that the lands should not pass in that case by way of covenant to stand seised. But in that case the conveyance was repugnant to the rules of law, for that it was *habendum* the land after the death of the grantor, and also repugnant in itself. For notwithstanding that it reserves the land to the father during his life, yet it provides for a payment of rent to him; wherefore the law would not help out a deed so contradictory and repugnant by way of raising a use.

The other case relied upon is between *Foster* and *Foster*, Hil. 13 of this King, in this Court, in ejectment. The case was: the mother, for divers good considerations and £20 paid, did by a deed, which was entitled articles of agreement, demise, grant, bargain, sell, assign, and set over to the son and his heirs for ever, certain lands; the said Margery the mother quietly enjoying the premises during her life.

The Court resolved that it should not amount to a covenant to stand seised; for they were but intended as articles of agreement,

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and preparatory for a further conveyance. So the case differs very much from ours, as also that it reserves the land to the mother during her life.

The case also of *Osborn and Bradshaw*, in 2 Cro. 127, hath been cited, where the father, in consideration of love which he bears to his son, and for natural affection to him, bargained and sold, gave, granted, and confirmed land to him and his heirs; the deed was enrolled. It was held the land should not pass unless money had been paid, or the estate executed. This case cannot be urged as any great authority, for it appears that the son was in possession. Therefore the Court adjudged that the deed should be a confirmation; and it being clear that way, they had not much occasion to insist upon or debate the other point. And he relied upon *Tebb and Peplowell's* case as an authority in the point, 2 Roll. 786, where there was a clause of warranty in the deed, and an enrolment within six \* months, as in the [\* 140] case at bar; but they resolved there, if a letter of attorney had been in the deed, it should not have been construed a covenant to stand seised; and therefore he prayed judgment for the plaintiff.

*Finch, Attorney-General, contra.*—The lands here cannot pass by bargain and sale, there being no money paid, which I find is admitted by the other side; neither shall it amount to a covenant to stand seised. There are five things necessary to raise a use by way of covenant:—

First, a sufficient consideration.

Secondly, a deed; as in *Calluml* and *Callard's* case, in 3 Cro. and in Popham's reports; and hath been often resolved since.

Thirdly, a seisin in the covenantor of the lands at the time of the deed; for a man cannot covenant to stand seised to a use of lands which he shall after purchase.

Fourthly, a clear and apparent intent.

Fifthly, apt and proper words. And the two last things are wanting in our case.

I agree, the word "covenant" is not necessary, so there be other words sufficient in law, and to declare the party's intent; for all words will not serve. A man covenanted upon good consideration that his feoffees should stand seised. It was resolved that no use should arise upon it, 1 Cro. 856. So *Sir Thomas Seymour's Case*, where a covenant was upon good consideration to levy a fine to cer-

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tain uses, and no fine was after levied. It was resolved that the covenant did not raise any use. Dyer, 96. Therefore 'tis usual to express in such deeds of covenant, that if the conveyances therein contained be not executed, that then the party shall from henceforth stand seised. And where it is said in *Vivian's Case*, Dyer, 302: one having given, granted, and released to his brother and his heirs certain manors, and no livery made, that Plowden would have averred that the deed was made *pro fraterno amore*, and so should raise a use; under the favour of the Court I deny that opinion of Plowden to be law. And in *Tebb and Peplewell's* case it is said that the land was enjoyed against the release. And in Moore, pl. 267: one covenanted in consideration of marriage to let his land descend, remain, or come to his daughter. It was resolved no use did arise thereupon.

In this conveyance there are not any words that sound in covenant; the only word that looks towards a use is the words "bargain" and "sell." And in *Ward and Lambert's* case, in 3 Cro. 394, it is held, that if one gives, or bargains and sells, land to his son, it shall not amount to a covenant to stand seised, for want of apt words.

[\* 141] \* Now the other are all words of common law, — give, grant, alien, enfeoff, and confirm. There is also a clause of special warranty in the deed, and a covenant to make further assurance by fine, recovery, &c., as great a preparation at common law as could be. And if the parties intend the land shall pass at the common law by transmutation of possession, there shall no use arise. Co. Lit. 49. Charter of feoffment to the son, it shall raise no use if no livery be made.

The word *debet* in this deed imports a general warranty, which is not qualified by the special warranty after; yet if the land pass by way of covenant to stand seised, there can be only a rebutter, and so no use of the general warranty. The authorities since have not been concurrent with *Tebb and Peplewell's* case, but contrary to it. And I rely upon the cases of *Pitfield and Pierce* and *Forster and Forster* in this Court, which have been remembered on the other side, but not answered. And whereas it is said that the *habendum* is after the death of them which conveyed the land, they are in that respect stronger than the case at bar; for by that it appears they could not intend a conveyance at the common law, which doth not allow such kind of limitations, therefore it must

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be by way of use, or no way: yet it was resolved they should not pass so.

It would introduce universal ignorance and carelessness, in such as draw conveyances, if the Court should apply their art to give them effect, however they were penned, and it is a rule, *politia legibus, non leges politis adaptantur.*

The Court, after hearing the case twice argued, were all of opinion that the land should pass by way of covenant to stand seised; and Hale cited Hob. 277, who doth there commend the Judges who are curious, and almost subtile to invent reasons and means to make acts effectual, according to the just intent of the parties.

They all held clearly that words proper for a conveyance at common law would raise a use, as “demise” and “grant” have been adjudged to amount to a bargain and sale without other words. And they said *Pitfield* and *Pierce's* case was adjudged upon the absurd contrivance of the conveyance, and so *Forster* and *Forster's* case in this Court; and for that in that case the deed was articles of agreement, preparatory to what the parties intended after, and the case in Moore, pl. 267, where there was a covenant in consideration of marriage to suffer the land to remain, descend, or come to the daughter; no use did arise there for the uncertainty how it was intended the daughter should take.

\* And they said, that if they should not construe a use [\* 142] to arise by such conveyance, as in the case at bar, it would overthrow all conveyances by lease and release.

And for the objection of the warranty in the deed, it is well known there is so in most conveyances to uses. Wherefore they gave judgment for the plaintiff.

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NOTE.—This judgment was afterwards affirmed upon error brought in the Exchequer Chamber.

**Goodtitle d. Edwards v. Bailey.**

Cowper, 597-601.

[This case is fully reported as No. 4 of “Estoppel,” 11 R. C. 48. It may be convenient here, however, to reproduce so much of the case as bears on the above rule.]

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No. 19.—**Goodtitle d. Edwards v. Bailey, Cowper, 597, 598.**

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It was an ejectment brought for two tenements in the county of Dorset, distinguished by the names of the greater and less tenement. The plaintiff claimed under the will of one Nicholas Edwards, dated March 12th, 1750, by which he devised the premises in question "to his wife F. Edwards for life, and after her decease to his brother John Edwards, to be at his disposal. But in case he should happen to die before the said F. Edwards, [\* 598] then he gave the premises to his cousin \* Robert Edwards (the plaintiff), and his heirs and assigns for ever." And he died soon after. Upon his death, John Edwards entered into and kept possession of the greater tenement during his life; and by will devised both the tenements to the defendant Peter Bailey. He was possessed of several other premises which he devised to the lessor of the plaintiff, by the same will; and died in the lifetime of Frances, the widow, who, upon the death of Nicholas, her husband, entered into and kept possession of the less tenement till she died. Upon the death of John, Peter Bailey, the defendant, took possession of the greater tenement, which John during his life had occupied. Soon after, Robert, the lessor of the plaintiff, by deed of release, bearing date 5th January, 1764, reciting the will of Nicholas, and also reciting the will of John Edwards, the brother of Nicholas; and further that Frances the widow had survived John, whereby the reversion of the premises was become vested in him, Robert, in fee; reciting also that it had been agreed that he the said Robert should renounce all his right, title, and interest in the said premises to Peter Bailey, the said Nicholas Edwards having no power to devise the same; he did thereby renounce, remise, release, and for ever quit claim to the said Peter Bailey, and the heirs male of his body, all the said premises, and all his right, title, and interest therein; with a covenant for further assurance. Subsequent to this release the widow died; and then Robert, the lessor of the plaintiff, brought this ejectment.

[In support of the defendant's title, it was argued], that supposing the release could not operate as such, for want of a sufficient possession in the releasee at the time, yet it might operate as a grant of the reversion. It is a settled rule in the construction of deeds, that if sufficient appears to show the intention of the party to convey, though it cannot take effect in the precise form in which it was intended, it shall operate in the way in which

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it can, rather than the intent of the parties shall be frustrated. Sheppard, in his Touchstone, 82, says, “A deed made to one purpose may enure to another; if meant for a release, it may amount to a grant of the reversion; or *e converso*.” So in 2 Wils. 75, a deed intended for a release was held to operate as a covenant to stand seised; and the cases there cited establish the doctrine. If so, nothing can be clearer than the intention of Robert to convey in this case; not only from the general words of the deed, but from the covenant for further assurance. . . .

For the plaintiff, it was contended, that admitting the rule laid down to be true in its fullest extent, yet nothing passed by the release in this case for want of proper operative words. . . .

Lord MANSFIELD.—The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense. That they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. But an objection is made in this case, which, it is said, takes it out of the general rule and the doctrine of the authorities cited; and that is, that in the release in question the word “grant” is not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in these premises, is manifest beyond a doubt. . . .

ASTON, Justice.—This is the common wording of a release, but though in the shape of a release, if there are sufficient words, it may operate as a grant. . . .

## ENGLISH NOTES.

Owing to the modern statutory facilities for conveying property by way of grant, it is not often necessary to have recourse to this rule for making out a title. As comparatively modern applications of the same principle, however, may be cited *Cottee v. Richardson* (1851), 7 Ex. 143, 21 L. J. Ex. 52, where a term which had been merged was expressed to be “bargained, sold, assigned, transferred, and set over” to X., to hold for all the residue of the said term, and this was held capable of operating as the creation of a new term equivalent to the residue of the old one; and *Beaumont v. Marquis of Salisbury* (1855), 19 Beav. 198, where a deed of sale by trustees with the words “grant, bargain, sell, and demise for the term of five hundred years” from a certain date was held to operate as an assignment of the same term of five

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hundred years which was vested in the trustees without impeachment of waste for the purpose of raising portions. The difficulty had arisen from the circumstance that the words "without impeachment of waste" were omitted in the deed of demise by the trustees.

#### AMERICAN NOTES.

These cases are cited in Devlin on Deeds, sect. 837. The inclination of our Courts to subordinate technical rule to the manifest intention is disclosed in the last note.

Chief Justice KENT, in *Jackson v. Myers*, 3 Johnson (N. Y.), 388; 3 Am. Dec. 504, said: "The intent, when apparent, and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of its meaning and effect" See *Parker v. Nichols*, 7 Pickering (Mass.), 111; *Barrett v. French*, 1 Connecticut, 354; 6 Am. Dec. 241; *Lynch v. Livingston*, 6 New York, 422; *Jackson v. Blodgett*, 16 Johnson (N. Y.), 172; *Wallis v. Wallis*, 4 Massachusetts, 135; 3 Am. Dec. 210; *Bryan v. Bradley*, 16 Connecticut, 474; *Russell v. Coffin*, 8 Pickering (Mass.), 143; *Brewer v. Hardy*, 22 Pickering, 376; 33 Am. Dec. 747; *Budd v. Brooke*, 3 Gill (Maryland), 198; 43 Am. Dec. 321; *Bent v. Rogers*, 137 Massachusetts, 192; *Lemon v. Graham*, 131 Penn. St. 447; 6 Lawyers' Rep. Annotated, 663. In *Coleman v. Beach*, 97 New York, 553, the Court said: "The questions involved are to be determined by a consideration of all the provisions contained in the deeds, with a view of arriving at the intent of the grantor in executing the conveyance. The rule governing controversies between grantor and grantee, by which the language of a conveyance is required to be taken most strongly against the grantor, has no application when the dispute occurs between parties claiming under the same conveyance, and who are each entitled to the benefit of the same rule of construction. Here the simple question is, to whom did the grantor intend to convey the property described? If the disposition which the owner of property desires to make does not contravene any positive prohibition of law, his control over it is unlimited, and the only office which the Courts are called upon to perform in construing his transfers of title is to discover and give effect to his intentions. In the case of repugnant dispositions of the same property contained in the same instrument, the Courts are from necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made. If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon, and interpretations of, the literal signification of the language used must be imposed as will give some effect if possible to all of the provisions of the deed. (*Salisbury v. Andrews*, 19 Pick. 250; *Norris v. Beyea*, 13 N. Y. 273; *Jackson v. Blodget*, 16 Johns. 178.) It is a cardinal rule in the construction of contracts that the intention of the parties is to be inquired into, and if not forbidden by law, is to be effectuated;

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and whenever the language used is susceptible of more than one interpretation, the Courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and of the subject-matter of the instrument.' (*French v. Carhart*, 1 N. Y. 102.) This rule is now, by statute, made imperative upon judicial tribunals, and cannot be evaded, when the intention of the grantor is made clearly apparent by the language of the conveyance. (3 R. S. [7th ed.] 2205, § 2.)

" Guided by these rules the effect of this conveyance is easily and surely determined. The declaration in the deed that the property conveyed was to be regarded as an advancement upon the share of the grantor's son in his estate, and that it was conveyed to the wife instead of the son, indicates that the arrangement was regarded in the light of a settlement upon the family of Frederick De Peyster, Jr., and repels the idea that it was intended to confer an absolute estate upon the grantee therein named. This view is further strengthened by the provisions intended to guard the *corpus* of the property conveyed from diminution while in the possession of the grantee, and the requirements that either the same property, or in case of its sale by the grantee during her life, its proceeds upon her decease, should be conveyed unimpaired to the issue of the grantee and Frederick De Peyster. The intention of the grantor that Mary Livingston De Peyster should enjoy only the rents, issues, and profits of the property conveyed during her life, is unmistakably expressed in the conveyance, and seems to require that such a construction should be given to the instrument as will effectuate that intention; although the granting part of the deed would seem to import a conveyance in fee, and a consequent repugnance between that estate and the remainder subsequently provided for, yet, when the whole instrument is considered together, the apparent repugnance is obviated by the express declaration that the form of the grant was adopted for the purpose only of enabling the grantee to sell and convey in fee simple the property described. The same repugnance and no greater occurs in all conveyances of property in trust, whereby the title is vested in trustees, but is made subject to the particular object defined in the subsequent clauses of the grant. Here the interest which the grantee was to take in the premises was clearly intended to be limited by the provisions inserted therein, requiring her to invest the entire proceeds of any sale of the property, either in real or personal securities, and the covenant by which she was upon her decease required to convey either the property itself, or the securities, in which its proceeds were invested to her issue. The circumstance that the ultimate disposition of the property was attempted by the grantor to be secured by a covenant does not in any degree impair the significance of the language used, as indicating his intent to direct such disposition. A construction that gives Mary Livingston De Peyster an absolute estate in fee in the land, renders the clause declaring the grantor's intent in making it unmeaning and absurd, and constitutes a violation of the rule requiring effect to be given to every part of the instrument. No question could have arisen over this instrument except for the use of inappropriate words on the part of the conveyancer in describing the method of transmission of the title from the grantee to her issue. The intent that the property

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should pass directly from the mother to such children as she should have by Frederick De Peyster, Jr., is expressed in clear and unambiguous terms, although the method of accomplishing this result is made impossible, if we are controlled by the letter of the deed. The covenant requiring the grantee upon her decease to convey the property to her issue is ambiguous and inappropriate. If construed according to its literal signification the physical capacity of the grantee to convey would have expired upon the happening of the same event which required her to execute the transfer of the title.

“It is evident therefore that the grantor did not intend that which the letter of his grant imports, and rules of interpretation are necessarily invoked to give effect to his intention.”

Husband and wife, in consideration of love and good will, deeded lands to their sons and their heirs, with usual covenants of seisin and warranty, reserving the use and improvement of the premises during the grantors’ lives. *Held*, that although inoperative as a feoffment, because purporting to convey a freehold in the future, it was valid as a covenant to stand seised to the use of the grantors during their lives, and after their death to the use of the grantees and their heirs. *Barrett v. French, supra*: “A deed should never be laid aside as void, if by any construction it could be made good.” The same substantial holding in *Wallis v. Wallis, supra*; *Brewer v. Hardy, supra*. So the words “remise, release, and quitclaim,” accompanied by a pecuniary consideration, are effectual as words of bargain and sale under the Statute of Uses. *Lynch v. Livingston, supra*.

Where a deed shows an intent to transfer any future interest which the grantor might acquire, the deed will be treated in equity as an executory agreement to convey, and the grantor will be compelled to convey the subsequently acquired interests. *Hannon v. Christopher*, 34 New Jersey Equity, 459.

A deed will be construed as a feoffment or as a deed of bargain and sale, as will most effectually accomplish the grantor’s intention, if the case be one where his intention is to prevail against strict rules of interpretation. *Ware v. Richardson*, 3 Maryland, 505; 56 Am. Dec. 762. “That there is some conflict upon the subject cannot be denied. The later and more modern decisions however seem to favor a more liberal construction of deeds and wills in order to reach the real intention of their makers, and therefore in all cases where an estate is devised or conveyed to trustees for the separate use of a married woman and her heirs, this Court will if possible so construe the instrument as to vest the legal estate in the trustees, because such a construction will best effectuate the intention of the donors.” Citing *Harton v. Harton*, 7 T. R. 652; *Ayer v. Ayer*, 16 Pickering (Mass.), 327; *Escheator, &c. v. Smith*, 4 McCord (So. Car.), 452.

If a deed may operate in two ways, one consistent with the intent of the parties and the other repugnant, it will be so construed as to effectuate the intention indicated by the whole instrument. *Pike v. Monroe*, 36 Maine, 309; 58 Am. Dec. 751.

To determine whether a deed is to operate immediately or as an executory contract, the Court will consult the intention of the parties, and this is to

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be sought in every part of the contract. So where the instrument was phrased, "doth and hath by these presents granted, bargained, sold, and forever quitclaimed," but was informally drawn, called by the parties an agreement, expressed to be in consideration of future acts and covenants to be done and performed, with no present sum paid, and with no words of inheritance, and without acknowledgment as a deed, it was held a mere executory contract. *Stewart v. Lang*, 37 Penn. State, 201; 78 Am. Dec. 414.

In *Thornton v. Mulquinne*, 12 Iowa, 549; 79 Am. Dec. 548, a sole heir-at-law executed to the intestate's widow an instrument phrased, "I, P. T., Sen., do hereby release and relinquish all and every claim and demand which I may have against the estate of P. T., Jun., late of Jackson County, deceased; and also relinquish all my right as heir to the above estate to and in favor of A. T., widow of the deceased." Held to carry the grantor's interest in the real as well as the personal estate. The Court said: "The true principle, and one entirely in accordance with modern jurisprudence, is that all instruments shall be so construed as to pass an estate, when such was the intention. *Russell v. Coffin*, 8 Pickering (Mass.), 143; Shep. Touch. 82. The rule is thus expressed in the case cited by PARKER, Ch. J.: 'When it is apparent that there was an intention in the grantor to convey, and in the grantee to take, although the instrument is not calculated technically to execute that intent, it should be made to operate in some other way to effect the purpose;' citing *Roe v. Tranmer*, 2 Wils. 78; *Clanrickard v. Sidney*, Hob. 277; *Crossing v. Scudamore*, 1 Vent. 141. The same rule is thus expressed in *Pray v. Pierce*, 7 Massachusetts, 381; 5 Am. Dec. 59: 'It is the duty of the Court to so construe the instrument as to give effect to the lawful intent of the parties, and not to defeat it.'" "And for remarks upon a kindred subject, and here applicable, see *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440. It is there said: 'We have not the various estates formerly known in England, with their complication of law. We have no occasion for their former distinction of conveyances. Is it not the intent and tone and spirit of all our laws and institutions, and tenure of lands, that the latter may be conveyed by any words which manifest that purpose, and for any consideration we please, so that others having legal or equitable claims on us are not injured?'"

PARKER, Ch. J., in *Russell v. Coffin*, 8 Pick. 143, uses this strong language: "This deed cannot operate as a release from the technical objection that Russell was not then in possession. But shall the deed have no effect? Was it not the intent that Coffin should sell, and that Russell should purchase? It would be going back to the dark ages to say that it shall have no effect, when between the parties it was supposed to be as good and effectual to pass the estate as a deed of bargain and sale should be. . . . Now, if the releasor is seised so as not to sell a pretended title, there can be no reason why his deed of quitclaim should not pass the estate. If he is not seised, and the releasee is not in possession, then nothing passes by the deed; though it may then operate as an estoppel against the releasor. We think it immaterial whether this deed is to operate as a gift, a bargain and sale, or a covenant to stand seised: it is sufficient that it passes the estate."

*Russell v. Coffin, supra*, stating the doctrine of the Rule, was cited and

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approved in *Cross v. Weare Com. Co.*, 153 Illinois, 499; 46 Am. St. Rep. 902, where it was held that a mortgage of a steam elevator carried the land on which it stood, although the conveyance was written on a chattel-mortgage form, acknowledged as such, and the property was referred to therein only as goods and chattels.

The general rule is that the deed must be upheld if possible, and terms and phrases will be interpreted to that end if it can be done consistently with rules and principles of law. *Edwards v. Bowden*, 99 North Carolina, 80; 6 Am. St. Rep. 487. So in *Melick v. Pidcock*, 44 New Jersey Equity, 525; 6 Am. St. Rep. 901, it was held that a trustee will take a legal estate in fee, limited to him in a deed without the word "heirs," if the trust be to the *cestui que trust* and his heirs. So breach of an "express condition" that the premises should not be used as a tavern, was held not to forfeit the estate, but to be a provision designed merely to limit the use. *Post v. Weil*, 115 New York, 361; 12 Am. St. Rep. 809. See as to controlling effect of intention, *Cravens v. White*, 73 Texas, 577; 15 Am. St. Rep. 803; *Peden v. Chicago, &c. Ry. Co.*, 73 Iowa, 328; 5 Am. St. Rep. 680; *Sharp v. Hall*, 86 Alabama, 110; 11 Am. St. Rep. 28 (deed or will?); *Bassett v. Bullong*, 77 Michigan, 338; 18 Am. St. Rep. 404; *Cooney v. Hayes*, 40 Vermont, 478; 94 Am. Dec. 425. In *Bassett v. Bullong, supra*, such effect was given to the manifest intention, that although the husband's quitclaim deed ran to the wife, her heirs and assigns forever, yet as after the *habendum* there were reservations that she should not convey on mortgage without his written assent, and that in case of her death before him the premises should revert to him and his assigns, it was held that the fee of the estate passed to the survivor. *Bartholemew v. Muzzy*, 61 Connecticut, 387; 29 Am. St. Rep. 206, is a very interesting case of similar construction, involving the assignability of contingent remainders and executory interests. So a deed to "the heirs of Warren," he being then living, was construed as a grant to his children, it being evidently so intended. *Heath v. Hewitt*, 127 New York, 166; 24 Am. St. Rep. 438; and the same principle in respect to the use of the word "heirs," in *Griswold v. Hicks*, 182 Illinois, 494; 22 Am. St. Rep. 549; *Vickers v. Leigh*, 104 North Carolina, 248; *Broliar v. Marquis*, 80 Iowa, 49; *Urich's Appeal*, 86 Penn. State, 386; 27 Am. Rep. 707.

A warranty deed by a tenant in common conveying by metes and bounds the portion of the common property which he intends to convey, will be held valid and effectuated in partition proceedings, when it can be done without injury to the other co-tenants. *Young v. Edwards*, 33 South Carolina, 404; 10 Lawyers' Rep. Annotated, 55.

Repugnant words must yield to the purpose of the grant, where such purpose is clearly ascertained from the premises of the deed, although such words stand first in the grant. *Flagg v. Eames*, 40 Vermont, 16; 94 Am. Dec. 363 (citing *Smith v. Packhurst*, 3 Atk. 136); *State v. Trask*, 6 Vermont, 365; 27 Am. Dec. 551. "There is one part of the deed which seems to limit the use to the grantees and their associates for certain public uses. This is apparently limiting a use upon a use; but this is clearly inconsistent with another part, which limits the use in the first instance to the public, with a contingent and resulting use to those who paid the consideration. This first clause was

**No. 20.—Bartlett v. Wright, Cro. Eliz. 299. — Rule.**

probably introduced as mere words of form, without apprehending their import, and is clearly repugnant to the manifest intention of the grantor. We have no difficulty therefore in giving effect to the deed, according to that intent."

"But it has never been supposed that technical words of limitation in a conveyance—and 'heirs of the body' are such—can be controlled by anything whatever." *Hileman v. Bouslaugh*, 13 Penn. State, 344; 53 Am. Dec. 474.

**No. 20.—BARTLETT v. WRIGHT.**

(1588.)

**No. 21.—DOE d. SMITH v. GALLOWAY.**

(1833.)

**RULE.**

WHERE land is conveyed under a general description, with the addition of words particularly denoting a certain subject comprised in that general description, that parcel only will pass to which the whole description applies. But where a description sufficiently certain in itself to denote a particular parcel of land is followed by words of further particular description not applicable to that parcel, the latter words may be treated as *falsa demonstratio*, and rejected.

**Bartlett v. Wright.**

Cro. Eliz. 299-300.

***Conveyance.—Description of Parcels.—Restrictive Addition.***

A demise of two yard-land in B. in the possession of G. will not pass [299] any parcel of the land in B. that is not in the possession of G.

*Ejectione firmæ.* For a messuage, one rood and two acres of land in Bridgenorth, of the lease of Elburne. The jury upon not guilty pleaded find a special verdict, "that one Delborough was seised of the house, and of two yard-land in B., and that the two acres of land were time out of mind parcel of the two yard-land; and that the said D. let to the said E., lessor of the plaintiff, all my house and two yard-land in B. in the possession of Geffe; and

No. 21.—*Doe d. Smith v. Galloway*, 5 Barn. & Ad. 43.

they found that the two acres of land were not in the possession of Geffe, but that all the residue were."

[\*300] \*The question was, if the two acres do pass? It was argued by Pudsey of the one part, and Herne of the other.

Gawdy conceived it did pass, for when it is named "my house and two yard-land in B.", this is sufficiently certain, and that which came after is not material; and it is good for all, though no part were in the possession of Geffe. Popham accorded. For when the law makes a certainty, that which cometh after and is repugnant is void: as if one grant the manor of D. in D., and this extends to D. and S., if he hath demesnes and services in D. and S., this shall pass only that which is in D.; for the words are supplied that a manor passeth; but if he hath demesnes and services only in D., then the whole shall pass, for otherwise the grantee shall not have a manor: so here, for that the yard-lands are entire, and he cannot have the yard-land except he have two acres, they shall also pass, and it shall not be restrained by the last clause. So if one hath five acres called Blacklands, and he granteth all his acres called Blacklands in the tenure of J. D., and J. D. hath but four of the acres, yet the five shall pass.

Clench and Fenner, *contra*. — For the intent of the parties was to pass only that which was in the tenure of Geffe, and yard-land is no such certainty; but when it is referred to another certainty, this shall be good, especially when the grant may be supplied by the land in the tenure of Geffe; but if no part were in his tenure, it is otherwise. *Et adjournit*. And afterwards, in Easter Term, 35 Eliz., Popham being absent, it was again moved; and against the opinion of Gawdy, it was adjudged for the defendant.

*Doe d. Smith and others v. Galloway.*

5 Barn. &amp; Ad. 43-51.

*Parcels. — Adequate Description. — Addition of falsa demonstratio.*

[43] Under a lease of all that part of the park called B., situate and being in the county of O, and now in the occupation of S., lying within certain specified abuttals, with all houses, &c., belonging thereto, and which now are in the occupation of S., a house on a part which is within the abuttals, but not in the occupation of S., will pass.

No. 21.—*Doe d. Smith v. Galloway*, 5 Barn. & Ad. 43, 44.

Ejectment. At the trial before GURNEY, B., at the Oxford Summer Assizes, 1832, it appeared that the premises claimed consisted of a cottage with the appurtenances, in the possession of the defendant, in Blenheim Park. Marsh, Stracey, and Stewart had extended a moiety of Blenheim Park under a writ of *elegit*. The moiety was regularly set out upon the inquisition, and delivered to Marsh, Stracey, and Stewart, who leased it to one Richard Smallbones. Smallbones held also the remainder of the park under another title, and he held the moiety leased to him by Marsh, Stracey, and Stewart up to the 22nd of June, 1824. By deed dated that day, Marsh, Stracey, and Stewart demised to Smith, Cleeve, and Southam all that part of the park called or known by the name of Blenheim or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of one Richard Smallbones, in a direct line across the said park from the gate called Old Woodstock Lodge (following the words of the inquisition), lying on the north-west side of the said line (setting out the other abutments in the words of the inquisition), together with the farm-houses, and other houses, &c., belonging or appertaining to the said premises, and which now are in the occupation of the said R. S., except and always reserved \*unto [\* 44] the said W. Marsh, J. H. Stracey, and M. Stewart, their executors, administrators, and assigns, all mines and quarries of stone, timber and other trees whatsoever (with a like exception and reservation of hedges, of a right of hunting, shooting, fishing, and fowling, and of the liberty of keeping a herd of deer in the park, and depasturing three heads of cattle there). Since the execution of this deed, Marsh, Stracey, and Stewart had become bankrupts, and all their property had been regularly assigned before the action was brought; the plaintiff, therefore, relied upon the lease to Smith, Cleeve, and Southam. The premises claimed were within the line and abutments set out in the inquisition and lease; but the defendant had occupied them, by the permission of the original owner, up to the time of the inquisition, without paying any rent, no demise having been made to her. Smallbones had also suffered her to occupy them in the same way during the whole time of his tenancy; and she had continued in a similar occupation up to the time of the action brought. It was now insisted for her, that the premises, not having been in the occupation of Smallbones, did not pass by the lease. The learned Judge

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No. 21.—**Doe d. Smith v. Galloway, 5 Barn. & Ad. 44-46.**

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directed the jury to find a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. The defendant obtained a rule to that effect in Michaelmas Term, 1832.

Talfourd, Serjt., and Walesby now showed cause. There can be no doubt that the intention of the parties to the lease of the 22nd of June, 1824, was that all which the lessors held by the *elegit* should pass; and the words of the demise are sufficient [<sup>\* 45</sup>] to carry that into \*effect. The premises are locally within

the line set out in the later part of the description, and the words added respecting the occupation are mere surplusage. Besides this, the defendant resided on the premises by the permission of Smallbones; they may, therefore, be considered to have been in his occupation. If it be contended that the part granted is limited, by grammatical construction, to the part occupied by Smallbones, the answer is that, by such a construction, all that was occupied by Smallbones would be within the grant. Now that would comprehend parts of the park without the described line. Besides, the lease goes on to make certain exceptions; and, if the present premises were not within the intention of the lessors, they also would have been marked off from the property within the prescribed line by a specific exception. In *Wrottesley v. Adams*, Plowd. 187, the words of a lease, as set out on the record, were "granted and to farm let to the same R. W. the tenements aforesaid, with the appurtenances, by the name of the reversion of all their [the grantors'] farm in B., and by the name of one other tenement there, with all the lands, leasows, pastures, and meadows to the same belonging, and with all and singular their appurtenances then in the tenure and occupation of the aforesaid R. W." On demurrer, an exception was taken that the "tenements aforesaid" (being the premises mentioned in the declaration) were not averred to have been in the tenure and occupation of R. W. 5th exception, p. 191. But the Court held that the averment was not necessary, and said that "another cer- [<sup>\* 46</sup>] tainty put to a thing which was certain enough before \* was of no manner of effect; and therefore there is a diversity where a certainty is added to a thing which is uncertain, and where to a thing certain." Therefore it was considered not to be material whether the farm of B. was in the tenure of R. W. or not. The Court also held that the words "one other tenement" were not material to make the lease good; and, consequently, that,

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so far as the farm of B. was concerned, no averment was necessary. So, where a demise was made of "all that their [the grantors'] glebe lands lying in C., viz. seventy-eight acres of land, and also the demesnes of the said seventy-eight acres, with all profits, commodities, tithes personal and predial, &c., belonging to the said subchanter and vicars, as parsons and proprietaries of the parish church of C., &c., and all other titbes whatsoever, and also the tithes of the said seventy-eight acres, all which were lately in the farm and occupation of M. P. ;" and it was found, on special verdict, that none of the tithes of the lands mentioned had been in the possession of M. P., but that other tithes and lands were in the tenure of M. P.; it was held, that the tithes of the lands mentioned passed by the demise. *Swift, Subchanter, and one of the Vicars Choral of Litchfield v. Eyres and others*, Cro. Car. 546; s. c. W. Jones, 435. The maxim, that where there is sufficient certainty in a description a false reference added shall not destroy its effect, was lately recognised in *Doe d. Ashforth v. Lower*, 3 B. & Ad. 459. [PARKE, J.—The general rule is laid down in *Doddington's Case*, 2 Co. Rep. 32 b, and in the note added at the end of the \* judgment there. There are [\* 47] also cases on the same point in Rolle's and Viner's Abridgments, Grant, 2 Rol. Abr. 54, 14 Vin. Abr. 87. See also 2 Rol. Abr. 423 and 425, Rent, B. 6, D. 7.<sup>1</sup>]

Jervis and Cooper in support of the rule. — It must be conceded that if the words "and now in the occupation," &c., had followed the particular description, the case would have fallen within the rules laid down in the cases cited. But here the words relied upon by the defendant precede the particular description; therefore, according to *Wrottesley v. Adams*, Plowd. 187, and *Swift v. Eyres*, Cro. Car. 546, and *Doddington's Case*, 2 Co. Rep. 32, the particular description must be rejected, if there be any inconsistency. And this was held in the case of *Stukeley v. Butler*, Hob. 168 (ed. 1724). There a bargain and sale was made of all woods, underwoods, &c., standing, growing, &c., in the whole of the bargainer's manor of C., viz. in all his wood called E., and in all his wood called B., and in other woods expressly named; and it was adjudged that woods in C., not being in any of the woods after-

<sup>1</sup> "If a man grants and confirms to another in fee 10s. rent, to take out of certain land, which rent he has of the grant

of his father; though he never had anything of the grant of his father, yet this shall create a rent."

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wards expressly named, should pass by the conveyance. [DENMAN, Ch. J. — As you construe the sentence, the question would be, whether you are compelled to resort to all the description for the purpose of understanding the meaning. Suppose the premises had been described by reference to a coloured plan, and the words had been “all the part coloured green and now in the occupation of

A. B.,” all the green must have passed, though some of [\*48] \* it had not been the occupation of A. B. LITTLEDALE, J.

Is it not the same thing, whether the place be expressly named, or its limits particularly set out?] In *Doe d. Perkin v. Perkin*, 5 Taunt. 321 (15 R. R. 515), it was held that a devise of all hereditaments in T. and then in the devisor’s own occupation, would not pass hereditaments in T. not occupied by the devisor. In *Blague v. Gold*, Cro. Car. 447, 473; see also *Hunt v. Singleton*, Cro. Eliz. 473, it was held that the devise of “the corner house in A. in the tenure of B. and H.,” passed a corner house in A. which was in the tenure of B.<sup>1</sup> (though not a house in the tenure of H. not being a corner house); and the reason given was, that the devise was of a thing certain at the first. Where a lease was made of a room, a ce’lar, a vault, and a yard, all expressly set out and described to have been late in A.’s occupation, it was held that a cellar, not expressly named, which was under the yard, but which had not been in the occupation of A., would not pass. *Doe v. Burt*, 1 T. R. 701 (1 R. R. 367). The word “and,” here, is superfluous in the description; the meaning must be the same as if the description of the parcels had been, “All that part, &c., which is now in the occupation of Smallbones, in a direct line,” &c. *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453, is in favour of the defendant; for there the Court held that such premises only passed by the devise as were within the whole of the description.

excluding such as corresponded to a part only of the description. [\*49] In *Swift v. Eyres*, Cro. Car. 546, there was an exception of the small tithes, which showed the intention of the parties to pass all the great tithes; here all that is excepted may be considered as merely in the nature of an easement or a privilege.

DENMAN, Ch. J. — Two parts only of the description of the

<sup>1</sup> This house was found by the jury to be in the tenure of B. and N., and the Court held, that if it were a joint tenure, all the house should pass, but that if one

part were in the tenure of B., and another part in the tenure of N., the former part only should pass.

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premises can be relied upon in support of the restrictive construction of this lease. The first part is the expression which occurs early in the description: "All that part of the park called or known by the name of Blenheim or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of Richard Smallbones." But as to this expression it is impossible not to see that the words "and now in the occupation" are, as it were, in the genitive case, agreeing with "park," not with "part." The other part of the description, which seems to favour the restrictive construction, occurs towards the close of the description; "together with the farm-houses and other houses, &c., appertaining to the said premises, and which now are in the occupation of the said Richard Smallbones." Had this occurred in a will, it might possibly have been interpreted as a qualifying restriction; but we cannot hold that general words added, as here, for the protection of a grantee, qualify the words by which the boundary of the district is set forth.

LITTLEDALE, J.—I am entirely of the same opinion. If the words "now in the occupation of one R. S." had followed the words "county of Oxford" directly, there might have been some ground for contending that the lease was intended to pass only all the part of Blenheim Park then in the occupation of Smallbones. Even then it \* would have admitted of considerable [\* 50] doubt whether such a construction were admissible. But the interposition of the word "and" precludes it altogether. It is contended that the words "now in the occupation," &c., are an essential part of the full description. If that were so, the description would mean much more than is suggested; for Smallbones occupied in Blenheim Park much besides that which the lessors had the power of passing. That which follows "the county of Oxford" is merely what is called false demonstration; and false demonstration cannot restrict. Taking the words as they are, it appears to me that all which is described in the words following the description of the occupation will pass. Many cases have certainly gone upon the circumstance that the particular description came first; in which it has been held that the effect of such a description is not altered by words of suggestion, or false demonstration, following it. Such are *Doe d. Beach v. The Earl of Jersey*, 1 B. & Ald. 550 (19 R. R. 380), and of *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453. And in the present case it is con-

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No. 21.—**Doe d. Smith v. Galloway, 5 Barn. & Ad. 50, 51.**

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tended that as the first part of the description is sufficiently certain, its effect cannot be destroyed by what follows. But in *Chamberlaine v. Turner*, Cro. Car. 129, the later words were held to enlarge a devise beyond the effect of the earlier ones. There the words were, "the house or tenement wherein William Nicholls dwelleth, called the White Swan," and William Nicholls occupied only the entry or alley and three upper rooms. But it was considered that the words "White Swan" showed that all the house was meant. And the same argument would apply here, even [\* 51] if we were to take the words "now in occupation" \* as referring to the word "part." *Chamberlaine v. Turner* closely resembles the present case.

PARKE, J.—I am of the same opinion. The question is, what passed by this demise. Now the rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if premises be described in general terms, and a particular description be added, the latter controls the former. Here is a grant of all that part, &c., in general terms; had it been a grant of all that part now in the occupation of Richard Smallbones, and lying on the north-west side of the line, the occupation would have been a material part of the description, and nothing would have passed which was not both in the occupation of Smallbones, and on the north-west side of the line. But if the terms "now in the occupation" apply, not to "part," but to "park," they may be rejected, for they can be no more than an additional description of the park; so that the meaning would be, "all that part of the park which is called Blenheim Park, and is now in the occupation of Smallbones;" and then follows the description of the part which is to be demised. Therefore, under the clause following, all the farm-houses, &c., belonging to the part demised pass also; so that we may reject the false demonstration which comes after this clause. It seems to me that this is the true construction of the early part of the grant, in consequence of the word "and;" and the minute description which follows cannot be brought into doubt by the words which come after it.

*Rule discharged.*

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#### ENGLISH NOTES.

The following principle is laid down in *Altham's Case*, 8 Co. Rep. 154 b: “Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia. The same rule, almost word for word, is put and agreed on both sides in 7 Ed. III., 10 a, *Margery Mortimer's Case*, Lit. Rep. 345, Hob. 172, sc., ‘Where a deed speaks by general words and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words;’ as if a man grants a rent *in manerio de D. percipiend* in 100 acres of land, parcel of the same manor, with clause of distress in the 100 acres, the rent shall issue out of the 100 acres only, and the general words shall be construed according to the special words.”

Lord ELLENBOROUGH, in *Roe d. Conolly v. Vernon* (1804), 5 East, 51, 79, referring to the cases of *Blague v. Gould*, Cro. Car. 447, and *Wyndham v. Wyndham*, Dyer, 376, draws the following distinction: “These cases appear very distinguishable from the present. The first of them, which is the case of *Blague v. Gould*, was a devise of a corner house in Andover, described as being in the tenure of Benson and Hitchcock, whereas it was in fact in the tenure of one Benson and one Nott; devisor also having another house, thereto near adjoining, in the tenure of Hitchcock. And it was holden that the corner house, in the tenure of Benson and Nott, passed; for that was the devise of a thing sufficiently ascertained by the words ‘corner house:’ and there the intent was apparent that the corner house should pass in whosesoever tenure it might happen to be. And the same case is further reported as again argued, and finally adjudged, Cro. Car. 473, where it is said that the addition *in tenurâ* of Hitchcock, although it be not in his tenure, and be a mistake, yet it is but surplusage; and, although false, shall not vitiate the devise; because the devise was of a thing certain at first, and shall be expounded according as the intent of the parties is apparent. The case of *Wyndham v. Wyndham*, Dyer, 376, was the case of a feoffment of a house, lately of Richard Cotton in D.; which was false, the owner being Thomas Cotton. The feoffor had no other house in D., and the feoffment was holden good. And the reason, according to Lord HARDWICKE (3 Atk. 9), was, that otherwise the devise would have been void. But in the case now before the Court, the surrender will not be void, though it should be construed not to extend to the uncompounded lands. And there is another circumstance by which the present case is distinguishable from those, viz. that in them the grant was of one particular thing sufficiently ascertained by some circumstance belonging to it; in which case, according

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to the doctrine upon this head, which is fully discussed in Lord Hobart, 171, 2, a circumstance mistaken and false will not frustrate the grant of particulars sufficiently once ascertained. But here the words first used are general words, not descriptive of particular things; and, according to Lord HARDWICKE in *Gascoigne v. Barker*, 3 Atk. 9, ‘where a man does not make a certain definitive description, it is very difficult for Courts of justice not to construe subsequent restrictive words as explanatory of the former.’”

In *Llewellyn v. Earl of Jersey* (1843), 11 M. & W. 189, 12 L. J. Ex. 243, the parcel conveyed was described by reference to a schedule which referred to a map or plan, and also described the quantity as 34 perches. The parcel was marked out with sufficient precision in the map, but the quantity as so marked amounted only to 27 perches. It was held that the quantity of 34 perches must be treated as *falsa demonstratio*. PARKE, B., said: “There are two principles of law applicable to this description: the first is, that *verba relata inesse videntur*; and consequently we must consider it to be the same thing as if the map, which is thus alluded to, had been actually inserted in the deed; the second is, that as soon as there is an adequate and sufficient definition of what is intended to pass by a deed, any subsequent erroneous addition will not affect it, and falls within the well-known rule, that it is *falsa demonstratio quae non nocet*.” The latter part of this passage is cited and followed by MONAHAN, Ch. J., in *Dublin and Kingstown Railway Co. v. Bradford*, 7 Ir. C. L. R. 63.

In *Murrell v. Fisher* (1849), 4 Ex. 604, 19 L. J. Ex. 263, a testator devised to F. and W. “all my leasehold farm-house, homestead, lands and tenements at Headington, containing about 170 acres, held under Magdalen College, Oxford, and now in the occupation of T. B. as tenant to me.” The testator was at the date of the will and at his death entitled to about six acres of land, which were included in the lease by Magdalen College, but were never in the occupation of T. B. And the question was whether these were included in the devise to F. and W. or in the residuary devise. It appeared that the quantity of 170 acres was too wide of the mark either way to afford any guide to the construction. The Court held that the land in question passed under the residuary devise, and not under the specific devise. ALDERSON, B., in delivering the judgment of the Court, said: “The question is not what the testator intended to have done, but what the words of the clause mean after applying to it the established rules of construction. One of these rules is ‘*falsa demonstratio non nocet*.’ Another is ‘*non accipi debent verba in demonstrationem falsam quae competit in limitationem veram*.’ The first rule means, if there be an adequate and sufficient description, with convenient certainty, of what was

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meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, I have some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true.”

Closely analogous to the case of words added to a general description are words which are so closely connected with the rest of the description as to form part of it, as in *Slingsby v. Granger* (1859), 7 H. L. Cas. 278, 28 L. J. Ch. 616, where a testatrix left to her brother “everything I may be possessed of,” for life and then to his children, but if he died a bachelor, left “the whole of my fortune now standing in the funds” to E. S. The testatrix had property in consols and also bank stock, which the Court held to be not within the description of “the funds.” It was held that the consols only passed by the gift. Lord CRANWORTH observed: “It was said that the case came within the rule *falsa demonstratio non nocet*. But the words here were too closely connected together for that argument to arise; they were found in the gift itself, and not in any mere description which followed it.” Lord WENSLEYDALE said: “She had left her brother the whole, while she had left the appellant (E. S.) the whole ‘now standing in the funds.’ There was a clear distinction between the two things, and in his opinion these added words could not be treated as a *falsa demonstratio*. There were no words which were properly descriptive of the bank stock, as to which the testatrix in the event that had happened had died intestate.”

Lord KINGSDOWN had arrived at the same conclusion with hesitation. His difficulty, however, did not arise upon the rule now under consideration, but as to whether there was not in the context enough to enlarge the meaning of the expression “the funds” so as to include the bank stock.

## AMERICAN NOTES.

*Doe v. Galloway* is cited in Jones on Real Property, sect. 415, and the doctrine of the Rule is uniformly applied in this country, both in respect to deeds and to wills. It is generally considered that if there are two descriptions in a deed which are inconsistent, the grantee may adopt the more beneficial one. *Melvin v. Prop. of Docks and Canals*, 5 Metcalf (Mass.), 15; 38

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Am. Dec. 384; *Esty v. Baker*, 50 Maine, 325; 79 Am. Dec. 616. Thus false names, false numbers, and false descriptions, if superfluous or not essential to the description set forth, may be rejected. The following are the leading cases in respect to deeds:—

In *Howell v. Saule*, 5 Mason (U. S. Circ. Ct.), 410, A. deeded to B. a piece of land by specific boundaries, and added, "it being the same land given by my honored mother to him, the said B., by her last will and testament, said land containing about five acres." The description in the will was of "a piece of plain land, of about four or five acres, lying," &c. The devise was void for coverture. It was held (STORY, J.) that the reference in the deed to the will was not controlling of "the legal effect of the preceding description, or intended to narrow its purport. It is a mere explanatory clause, expressive of his view that the land is the same which was devised by his mother. He does not say that he grants what was devised by her, and *no more*: but he grants a certain piece of land, containing five acres, by specific boundaries, and then adds a statement of what he supposes to be a fact. Suppose none of the land had been devised in his mother's will; would the grant have been utterly void? Certainly not."

In *Myers v. Ladd*, 26 Illinois, 415, there was a mortgage of property "in his mill in Lancaster, Timber Township, Peoria County, State of Illinois." The mill was four miles from Lancaster in that township. It was held that the "in Lancaster" should be dropped. The Court said: "So if a deed describes land by its correct numbers, and further describes it as being situated in a wrong county, the latter is rejected. The rule is that where there are two descriptions in a deed, the one as it were superadded to the other, and one description being complete and sufficient of itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature or circumstance in the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone." To the same effect, *White v. Gay*, 9 New Hampshire, 126; *Harvey v. Mitchell*, 31 ibid. 575; *Bell v. Sawyer*, 32 ibid. 75; *Eastman v. Knight*, 35 ibid. 551 (where a deed referred for description to another "of even date herewith," but it was of a different date, and the date was dropped); *Jackson v. Loomis*, 19 Johnson, 449; 18 ibid. (N. Y.), 84 (where a wrong number was rejected); *Jackson v. Root*, 18 ibid. 60 (where the grant was of "the 600 acres of land due me from the public as a soldier in Col. Lamb's regiment of artillery," and it was held valid although the grantor was a soldier in another regiment), the Court saying: "If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." *Thompson v. Jones*, 4 Wisconsin, 106; *Smith v. Chatham*, 14 Texas, 322; *Abbott v. Pike*, 33 Maine, 204; *Worthington v. Hylyer*, 4 Massachusetts, 105 (the reporter citing *Doe v. Galloway*, in note); *Sharp v. Thompson*, 100 Illinois, 447; 29 Am. Rep. 61; *Green Bay & M. C. Co. v. Hewitt*, 55 Wisconsin, 96; 42 Am. Rep. 701; *Cummings v. Black*, 65 Vermont, 76; *Rutherford v. Tracy*, 48 Missouri, 325; 8 Am. Rep. 104; *Cate v. Thayer*, 3 Maine, 71; *Haley v. Amestoy*, 44 California, 132; *Scull v. Pruden*, 92 North Carolina, 168.

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Browne on Parol Evidence says of wills (sect. 126): "A description partly false may be made operative by rejecting the false part, provided the remaining portion reasonably corresponds with the person, thing, or interest indicated by such extrinsic evidence; but no words may be added to any description."

Thus in *Allen's Lessee v. Lyons*, 2 Washington (U. S. Cir. Ct.), 475, the devise was of "his house and lot on Third Street, in the occupation of R. H." The testator owned no house and lot on Third Street, but owned one in Fourth Street, occupied by R. H. The reference to the street was dropped. In *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradford (N. Y. Surrogate), 144, there was a bequest of "my shares of Mechanic Bank stock in the city of New York." The testator had no bank stock except in the City Bank, and this was held to pass. In *Patch v. White*, 117 United States, 210, the devise was of "lot 6 in square 403, together with the improvements thereon." The testator did not own that lot, but owned lot 3 in square 406. The latter was held to pass. In *Button v. Tract Society*, 23 Vermont, 336, a devise to the "American Home Mission Tract Society" was held to operate in favor of the "American Tract Society," there being no devisee as the one described.

These cases will serve as types of a great number, and reference may be made to *Winkley v. Kaine*, 32 New Hampshire, 268; *Riggy v. Myers*, 20 Missouri, 239; *Woods v. Moore*, 4 Sandford (N. Y. Super. Ct.), 579; *Moreland v. Brady*, 8 Oregon, 303; 34 Am. Rep. 581; *Merrick v. Merrick*, 37 Ohio State, 126; 41 Am. Rep. 493; *Decker v. Decker*, 121 Illinois, 341; *Peters v. Porter*, 60 Howard Practice (N. Y.), 422; *Allen v. Bowen*, 105 Illinois, 361; *Dunham v. Averill*, 45 Connecticut, 61; 29 Am. Rep. 642; *St. Luke's Home v. Association, &c.*, 52 New York, 191; 11 Am. Rep. 697; *Tucker v. Seaman's Aid Society*, 7 Metcalf, 188; *Eckford v. Eckford*, 91 Iowa, 54; 26 Lawyers' Rep. Annotated, 370; *Whitcomb v. Rodman*, 156 Illinois, 116; 47 Am. St. Rep. 181; 28 Lawyers' Rep. Annotated, 149; *Griscom v. Evens*, 11 Vroom (New Jersey), 402; 29 Am. Rep. 251.

A few cases are to the contrary: *Kurtz v. Hibner*, 55 Illinois, 514; 8 Am. Rep. 665; *Bishop v. Morgan*, 82 Illinois, 558; 25 Am. Rep. 327; *Bingel v. Voltz*, 142 Illinois, 214; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; 14 Am. Rep. 538; *Judy v. Gilbert*, 77 Indiana, 96; 40 Am. Rep. 289. The Illinois cases seem to be overruled in *Whitcomb v. Rodman*, *supra*, and the Iowa case in *Eckford v. Eckford*, *supra*.

That evidence of bare intention is inadmissible: *Mann v. Executor of Mann*, 1 Johnson Chancery (N. Y.), 232; *Pickering v. Pickering*, 50 New Hampshire, 349; *Walston's Lessee v. White*, 5 Maryland, 297.

A wholly omitted description cannot be supplied. *Crooks v. Whitford*, 47 Michigan, 283.

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No. 22.—Heydon's Case, 3 Co. Rep. 7a.—Rule.

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### SECTION III.—*Interpretation of Acts of Parliament.*

#### No. 22.—HEYDON'S CASE.

(1584.)

No. 23.—BRUCE (LORD HENRY) *v.* AILESBOURY (MARQUESS OF)  
(H. L. 1892.)

#### RULE.

In the interpretation of an Act of Parliament four things are to be considered: 1. What was the state of the law before the making of the Act. 2. What was the mischief and defect for which that law did not provide. 3. What remedy the Parliament has resolved upon. 4. The true reason of the remedy.

And the office of the Court is to construe the statute so as to suppress the mischief, to prevent evasion, and to advance and add force to the remedy according to the true intent of the makers of the Act for the public good.

#### **Heydon's Case.**

3 Co. Rep. 7 a-9 a.

#### *Statute.—Interpretation.*

In order to construe a statute truly, four things are to be considered: 1st, What the common law was before; 2nd, What the mischief was for which the common law had not provided; 3rd, The remedy provided by the Act; 4th, The true reason of the remedy. And the Judges are to construe Acts so as to redress the mischief and extend the remedy.

[7 a] In an information upon an intrusion in the Exchequer, against Heydon, for intruding into certain lands, &c., in the county of Devon: upon the general issue, the jurors gave a special verdict to this effect:—

First, they found that parcel of the lands in the information was ancient copyholds of the manor of Ottery, whereof the warden and canons regular of the late college of Ottery were seised

## No. 22.—Heydon's Case, 3 Co. Rep. 7 a, 7 b.

in the right of the said college; and that the warden and canons of the said college, 22 Hen. VII., at a Court of the said manor, granted the same parcel by copy, to Ware the father and Ware the son, for their lives, at the will of the lord, according to the custom of the said manor; and that the rest of the land in the information was occupied by S. and G. at the will of the warden and canons of the said college for the time being, in the time of Henry VIII. And further, that the said S. and G. so possessed, and the said Ware and Ware so seised as aforesaid, the said warden and canons by their deed indented, dated 12 January, anno 30 Hen. VIII., did lease the same to Heydon the defendant for eighty years, rendering certain rents severally for several parcels; and found that the said several rents in Heydon's lease reserved were the ancient and accustomed rents of the several parcels of the lands, and found, that after the said lease they did surrender their college and all the possessions thereof to King Henry VIII. And further found the statute of 31 Hen. VIII., c. 13, and the branch of it, *scil.* by which it is enacted, "That if any abbot, &c., or other religious and ecclesiastical house or \* place, [\* 7 b] within one year next before the first day of this present Parliament, hath made, or hereafter shall make, any lease or grant for life, or for term of years, of any manors, messuages, lands, &c., and in the which any estate or interest for life, year or years, at the time of the making of such grant or lease, then had his being or continuance, or hereafter shall have his being or continuance, and not determined at the making of such lease, &c. Or if the usual and old rents and farms accustomed to be yielded and reserved by the space of twenty years next before the first day of this present Parliament is not, or be not, or hereafter shall not be thereupon reserved or yielded, &c., that all and every such lease, &c., shall be utterly void." And further found, that the particular estates aforesaid were determined, and before the intrusion Heydon's lease began; and that Heydon entered, &c. And the great doubt which was often debated at the Bar and Bench, on this verdict, was, whether the copyhold estate of Ware and Ware for their lives, at the will of the lords, according to the custom of the said manor, should in judgment of law be called an estate and interest for lives, within the said general words and meaning of the said Act. And after all the Barons openly argued in Court in the same term, *scil.* Pasch. 26 Eliz., and it was unanimously

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resolved by Sir ROGER MANWOOD, Chief Baron, and the other Barons of the Exchequer, that the said lease made to Heydon of the said parcels, whereof Ware and Ware were seised for life by copy of court-roll, was void; for it was agreed by them that the said copyhold estate was an estate for life, within the words and meaning of the said Act. And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.

And, 4th. The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the

Act, *pro bono publico*. And it was said, that in this case [\*8 a] the common law was, that religious and ecclesiastical \* persons might have made leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases: now the statute of 31 Hen. VIII. doth provide the remedy, and principally for such religious and ecclesiastical houses which should be dissolved after the Act (as the said college in our case was), that all leases of any land, whereof any estate or interest for life or years was then in being, should be void; and their reason was, that it was not necessary for them to make a new lease so long as a former had continuance; and therefore the intent of the Act was to avoid doubling of estates, and to have but one single estate in being at a time: for doubling of estates implies in itself deceit, and private respect, to prevent the intention of the Parliament. And if the copyhold estate for two lives and the lease for eighty years shall stand together, here will be doubling of estates *simul & semel*, which will be against the true meaning of Parliament.

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And in this case it was debated at large, in what cases the general words of Acts of Parliament shall extend to copyhold or customary estates, and in what not; and therefore this rule was taken and agreed by the whole Court, that when an Act of Parliament doth alter the service, tenure, interest of the land, or other thing, in prejudice of the lord, or of the custom of the manor, or in prejudice of the tenant, there the general words of such Act of Parliament shall not extend to copyholds: but when an Act of Parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, there many times copyhold and customary estates are within the general purview of such Acts. And upon these grounds the CHIEF BARON put many cases, where he held, that the statute of West. 2, *de donis conditionalibus* did not extend to copyholds; for if the statute alters the estate of the land, it will be also an alteration of the tenure, which would be prejudicial to the lord: for of necessity the donee in tail of land ought to hold of his donor, and do him such services (without special reservation) as his donor doth to his lord.

2nd. Littleton saith (lib. 1, cap. 9), That although some tenants by copy of court-roll have an estate of inheritance, yet they have it but at the will of the lord, according to the course of the common law. For it is said, that if the lord put them out, they have no other remedy but to sue to their lord by petition; and so the intent of the statute *de donis conditionalibus* was not to extend (in prejudice of lords) to such base estates, which as the law was then taken, was but at \*the will of the lord. [\*8 b] And the statute saith, “Quod voluntas donatoris in carta doni sui manifeste express. de cætero observetur;” so that which shall be entailed, ought to be such an hereditament, which is given, or at least might be given by deed or charter in tail.

3rd. Forasmuch as great part of the land within the realm is in grant by copy, it will be a thing inconvenient, and occasion great suit and contention, that copyholds should be entailed, and yet neither fine nor common recovery bar them; so as he who hath such estate cannot (without the assent of the lord by committing a forfeiture, and taking a new estate) of himself dispose of it, either for payment of his debts, or advancement of his wife or his younger children; wherefore he conceived that the statute *de donis conditionalibus* did not extend to copyholds, *quod fuit*

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*concessum per totum Curiam.* But it was said that the statute, without special custom, doth not extend to copyholds; but if the custom of the manor doth warrant such estates, and a remainder hath been limited over and enjoyed, or plaints in the nature of a formedon in the descender brought in the Court of the manor, and land so entailed by copy recovered thereby, then the custom co-operating with the statute makes it an estate tail; so that neither the statute without the custom, nor the custom without the statute, can create an estate tail.

And to this purpose is Littleton, lib. 1, c. 8, for he saith, that if a man seised of a manor, within which manor there hath been a custom which hath been used time out of memory, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple or fee tail, or for term of life, &c., at the will of the lord, according to the custom of the same manor; and a little after, that formedon in descender lies of such tenements, which writ, as it was said, was not at the common law.

To which it was answered by the CHIEF BARON, that if the statute (without custom) shall not extend to copyholds, without question the custom of the manor cannot make it extend to them; for before the statute all estates of inheritance, as Littleton saith, lib. i. cap. 2, were fee simple, and after the statute no custom can begin, because the statute being made in 13 Ed. I. is made within time of memory; *ergo* the estate tail cannot be created by custom; and therefore Littleton is to be intended (inasmuch as he grounds his opinion upon the custom, that copyholds may be granted in fee

simple or fee tail) of a fee simple conditional at the common law: for Littleton well knew that no custom \* could commence after the statute of West. 2, as appears in his own book, lib. 2, c. 10, and 34 Hen. VI., 36. And where he saith that formedon in descender lies, he also saith, that it lies at the common law. And it appears in our books that in special cases a formedon in the descender lay at the common law, before the statute of Westm. 2, which see 4 Ed. II., formedon 50, 10 Ed. II., formedon 55, 21 Ed. III., 47. Plowd. Com. 246 b, &c.

And where it was further objected, that the statute of West. 2 cannot without custom make an estate tail of copyholds, because without custom such estate cannot be granted by copy; for it was said, if estates had been always granted to one and his heirs by

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copy, that a grant to one and the heirs of his body is another estate not warranted by the custom: so that in such manors where such estates of inheritance have been allowed by custom, the statute doth extend to them, and makes them, which before were fee conditional, now by the statute estates in tail, and that the statute cannot, as hath been agreed before, alter the custom, or create a new estate not warranted by the custom.

To that it was answered by the CHIEF BARON, that where the custom of the manor is to grant lands by copy *in feodo simplici* (as the usual pleading is), without question, by the same custom lands may be granted to one and the heirs of his body, or upon any other limitation or condition; for these are estates in fee simple, *et eo potius*, that they are not so large and ample as the general and absolute fee simple is, and therefore the generality of the custom doth include them, but not *e converso*; *ad quod non fuit responsum*. But it was agreed by the whole Court that another Act made at the same Parliament, cap. 18, which gave the *clexit* doth not extend to copyholds, for that would be prejudicial to the lord, and against the custom of the manor, that a stranger should have interest in the land held of him by copy, where by the custom it cannot be transferred to any without a surrender made to him, and by the lord allowed and admitted. But it was agreed by them that other statutes made at the same Parliament, which are beneficial for the copyholder, and not prejudicial to the lord, may be, by a favourable interpretation, extended to copyholds, as cap. 3, which gives the wife a *cui in vita*, and receipt, and cap. 4, which gives the particular tenant a *quod ei deforceat*; and therewith agrees 10 Ed. IV., 2 b.

And in this case it was also resolved, that although it was not found that the said rents were the usual rents, accustomed to be reserved within twenty years before the Parliament; yet inasmuch as they have found that the accustomable rent was reserved, and a custom goes at all times before, for this cause it shall be intended that it was the accustomable rent within the twenty years, and so it should be intended, if the contrary be not showed of the other side. And judgment was entered for the Queen.

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**Bruce (Lord Henry) and others (Appellants) v. Ailesbury (Marquess of) and another (Respondents).**

1892, A. C. 357-366 (s. c. 67 L. T. 490).

*Interpretation of Statute.—Object of Legislature.—Settled Land Acts, 1882, 1890.*

[356] In the Settled Land Acts, 1882 and 1890, the paramount object of the Legislature was the well-being of settled land.

An estate including an old family mansion-house became vested under a settlement in a tenant for life, a young man who had mortgaged his life estate to a money-lender who had brought an action for foreclosure. The tenant for life, who was too poor to reside on the estate, had contracted under the Settled Land Acts to sell the whole for a good price to a wealthy purchaser, and petitioned under s. 10 of the Settled Land Act, 1890, for the sanction of the Court to the sale of the mansion-house and demesne lands. The remainder-men opposed the petition, desiring that the mansion-house and demesne lands should remain in the family.

*Held*, affirming the decision of the Court of Appeal ([1892] 1 Ch. 506), that the Court in the exercise of its discretion under the Settled Land Acts must have regard to the well-being of the land and the interests of the persons from whose industrial occupation the rents and profits were derived, as well as to the interests of those entitled under the settlement; and that to refuse the sanction in such a case would be to defeat the object of the Legislature.

Appeal from an order of the Court of Appeal reversing a decision of STIRLING, J. The circumstances and the arguments in both Courts are set out at length in the report of the decisions below. The following outline is enough for the present purpose:—

Under a settlement of July, 1885, the Marquis of Ailesbury became in 1886 tenant for life in possession of the Savernake estate, without impeachment of waste, with remainder to [\* 357] his first \* and other sons in tail male, with remainder to his uncles Lord Henry, Lord Robert, Lord Frederick, and Lord Charles Bruce successively for life and their first and other sons successively in tail male, with ultimate remainder to the Marquis in fee. The Marquis, who was born in 1863, was married in 1884, but had no issue.

The Savernake estate comprised a mansion-house and about 40,000 acres, of which about 7700 consisted of pleasure grounds, park and lands usually occupied with the mansion-house, including Savernake Forest. The other lands were chiefly arable, down, and pasture farms, with timber of considerable value, many cottages, and some house property in Marlborough. The net yearly income

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of the whole, after payment of outgoings, jointures, and interest on mortgages, was about £900, and rents were falling. The life interest of the Marquis was mortgaged for £212,000: the mortgagee had brought an action for foreclosure; and a receiving order had been made. The mansion-house and lands usually occupied therewith were very costly to keep up.

In June, 1891, the Marquis entered into contracts with Lord Iveagh (a wealthy man) under the Settled Land Acts, 1882 to 1890, to sell to him the fee simple of the whole estate for £750,000, £500,000 of the purchase-money to be left upon mortgage for five years at 4 per cent, the agreement being conditional upon an order of the Court being obtained to authorise the sale of the mansion-house, pleasure grounds, park, and lands usually occupied therewith, as required by sect. 10 of the Settled Land Act, 1890. The Marquis then presented a petition under the Settled Land Acts praying the sanction of the Court to the sale of the mansion-house, pleasure grounds, &c., and to the arrangement for the £500,000 to be left on mortgage. The consent of the trustees of the settlement could not be obtained to the sale, one being adverse. The petition was opposed by Lord Henry Bruce, the heir-presumptive to the Marquisate, and by Lord Robert and Lord Frederick, for several reasons, of which those material to the present report were that Savernake was now the only residence of the Ailesbury family, had been their principal residence since 1675, and was of great value and of historical and exceptional interest, comprising as it \* did the beautiful and unique Savernake [\* 358] Forest. There was evidence that the price, £750,000, was an extremely good one: much better than could be again expected; and that without the mansion-house, pleasure grounds, park, and lands usually occupied therewith the estate could not be sold so advantageously. If the sale were carried out the income of the Marquis, and after his death of the remainder-men, would be considerably increased.

STERLING, J., made an order dismissing the petition. The Court of Appeal (LINDLEY, BOWEN, and FRY, L.J.J.) discharged that order, and made an order that the Marquis be at liberty to sell the mansion-house with the pleasure grounds, park, and lands usually occupied therewith, and the other lands comprised in the agreement, in accordance with the terms of the contracts, and that the contracts be confirmed. ([1892] 1 Ch. 506.)

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Aug. 1. Sir H. Davey, Q. C., and Buckley, Q. C. (G. Henderson with them), for the appellants:—

The error is in considering matters outside the statute. The object of the Settled Land Acts was to increase the marketable quality of land, and to enable settled lands to be sold for the benefit of all interested in the settlement. The Acts say nothing about tenants, or the cultivation of the land or the welfare of the cottagers; the only parties to be considered by the Court are those interested in the settlement, and the Court should act as prudent trustees would. The tenant for life is put in the position of a trustee; he must exercise a discretion, and, as enacted by sect. 53 of the Act of 1882, "have regard to the interests of all parties entitled under the settlement," including the interests of sentiment and attachment to the family place. As the trustees will not consent, he must satisfy the Court of the propriety of the sale and that he has had regard to the interests of the remainder-men. Those interests he has admittedly disregarded. Surely something more is meant to be secured than that the tenant for life shall have a good price which will make his income larger and his circumstances more comfortable. The Court must look beyond the mere pecuniary, commercial question, and must regard the position in the country of the head of a great house, \* largely dependent on ancestral estates. A mansion-house is not usually regarded as an element of profit. If, as is urged, the Acts were passed with a view to the improvement of estates, then let the estate be sold but the mansion-house, &c., spared. That and the residential lands might be let advantageously. The remainder-men desire to retrieve the family fortunes. The next Marquis may succeed in doing so: why should all possibility of their regaining their ancient position in the county be for ever cut off?

[They also referred to heirlooms, sect. 37 of the Settled Land Act of 1882; *In re Earl of Radnor's Will Trusts*, 45 Ch. D. 402, 416; sect. 10 of the Settled Land Act of 1890; and the Settled Estates Acts, 1856, 1858, 1864, 1874, and 1877.]

Rigby, Q. C., and Fossett Lock for the Marquis of Ailesbury; and Sir H. James, Q. C., and Muir Mackenzie for the other respondent,—one of the trustees,—were not heard.

The House took time for consideration.

1892, Aug. 9. Lord HALSBURY, L. C.:—

My Lords, in this case your Lordships are called upon to con-

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sider the exercise of the discretion which has been vested in the Court by the Settled Land Act of 1890, sect. 10, sub-sect. 2, which is in these words: “(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.” Sect. 3, sub-sect. 1, of the Act of 1882, of which the sub-section I have just recited is an amendment, but which adds nothing which is relevant to any dispute between the parties here, gives an absolute power to the tenant for life to sell the settled land.

By sect. 53 of the Act of 1882 it was enacted that a tenant for life in exercising any power under the Act should have regard to the interests of all parties entitled under the settlement, and \* should in relation to the exercise thereof by him be [\* 360] deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Of the 40,000 acres of which the estate now in question consists, it cannot be denied that the tenant for life has in respect of 33,000 of them at all events an absolute right to sell; that has not been and could not be disputed. The question arises under the restriction as to the mansion-house and the lands, pleasure grounds, and park usually occupied therewith. It scarcely requires argument to show that if the commercial interest is alone to be considered the withdrawing from the sale of the mansion-house and the pleasure grounds usually occupied therewith, in this particular case, would have a very serious depreciatory effect upon the sale of the remainder. The 7000 acres by themselves, or the odd 33,000 acres by themselves, certainly would not be likely to realise, if sold separately, the gross sum which would be obtained by selling both as one estate. But the question your Lordships have to determine is whether, under the circumstances of this particular case, consent should be given to the sale of the whole.

It cannot be denied that the tenant for life is not in a position to do that which may be compendiously described as “keeping up the estate.” If capital expenditure, either for repairs or otherwise, is required, he cannot supply it. The estate during the period of his life (and he is still a young man) must pass into the hands of his creditors, whose interest in it would be confined to realising

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their security. I say nothing of his own wishes, I say nothing of his own conduct. I simply refer to the dry facts, which render it to my mind a matter of absolute certainty, that if the estate is to be continued as vested in him, neither improvement, repair, nor profitable occupation, either to the estate or to the individual, is likely to result from a continuance of the estate in its present incumbered condition.

Under these circumstances the tenant for life has consented to sell, and an offer has been made for the estate, as to which it has hardly been seriously contended that it is not a good and even advantageous offer, though not perhaps, as Sir Horace Davey [\* 361] \* said, an extraordinarily lavish one. The trustees of the settlement have not in this case consented, but are divided in opinion, and the Court therefore has to determine whether upon the facts of this case the consent ought or ought not to be withheld.

Now the Act of Parliament itself contains, either by way of recital or preamble, nothing to show what the meaning or policy of the statute was; but the power given for the tenant for life to sell notwithstanding that, by the terms of the settlement, his powers did not extend beyond his own life, seems to me (apart from every extraneous consideration) enough to show that what the statute intended to do was to release the land from the fetters of the settlement,—to render it a marketable article notwithstanding the settlement. And, historically, one knows very well what were the objections made to the law of settlement in its effect upon the cultivation and useful occupation of land.

Now, it has been a very familiar canon of construction to contemplate what was the cause and reason of the Act, or, in other words, the mischief requiring a remedy. Thus in *Heydon's Case*, 3 Co. Rep. 7 b, 8 a (p. 816, *ante*), the common law was that religious and ecclesiastical persons might have made leases for as many years as they pleased. It has been said that the mischief was that when they perceived their houses would be dissolved they made long and unreasonable leases, and it was in that case the Barons of the Exchequer resolved among other considerations for the construction of statutes, that it should be considered what was the mischief and defect against which the common law did not provide, and what was the remedy which Parliament hath resolved and appointed to cure the disease of the Commonwealth.

I can contemplate many cases where it would be the duty of

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the trustees to withhold their consent. Questions, however, arise on which I am reluctant to enter, since I might be impliedly expressing opinions upon the mode in which the discretion should be exercised in cases which are not now before me.

I prefer to say that in this case there is every circumstance \* which should induce the Court to give its assent. [\* 362] The tenant for life is young. No one of the persons who appear in opposition to the petition may ever have any interest in the property ; and in the meantime the property, to whomsoever it may ultimately belong, would almost certainly be deteriorated in value in proportion as the *status quo* continues.

Whether or not what have been called “the sentimental considerations” are legitimate subjects of consideration or not it is not necessary to determine, since it is manifest from the whole structure of the Act—and, indeed, from the very circumstance that no limit is laid down to the discretion—that the Legislature contemplated consent being given by the Court notwithstanding any opposition by those who might be next in remainder.

It was said that such a construction of the discretion would be to assume a very strong act of the Legislature; but it is only necessary to reply that the very fact of setting aside the determination of the settlement that particular land should go to particular persons designated or capable of being afterwards ascertained is as strong an act of the Legislature as it is possible to conceive, and certainly in respect of the land not within the protection of the excepted portion that has undoubtedly been done.

I notice that some of the Judges have used the phrase that this statute is not an Incumbered Estates Act. I think it would be more accurate to say that it is not *solely* an Incumbered Estates Act; but for myself I am prepared to say that it was in many respects analogous to, and had in part the same objects as, the Acts that are so described.

It would, of course, be an inefficient and therefore an inaccurate description of this Act to speak of it as an Incumbered Estates Act ; but, nevertheless, by whatever name it is known, I think it undoubtedly did contemplate that an incumbered proprietor who was a limited owner was unable to fulfil the duties of proprietorship, and that it was not for the good of the State that the incumberd proprietor should be compelled to continue in a position in which he could do no good either to himself or anybody else.

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[\* 363] \* The Royal Commission on Agriculture disclosed in more than one part of the evidence the evils incident to such a condition of things, and the only difficulty I have had in commenting on the judgments of the Court of Appeal is, that I think their Lordships have been misunderstood in treating the evidence which showed the injury to the estate rather as if that evidence was itself the mischief against which the Act was directed, and not the injury to the estate which I believe is the key to the enactments of the statute.

The provisions as to heirlooms, I think, raise very different considerations. I am not certain that any public considerations intervene when the question of the sale of heirlooms arises. It is enough, however, to say that public considerations here do very largely enter into the policy of the particular provisions in the Act with which your Lordships are now dealing.

My Lords, under these circumstances, I cannot doubt that the appeal should be dismissed, and the order of the Court of Appeal affirmed, and I move your Lordships accordingly.

Lord HOBHOUSE who is unable to attend, requests me to state that he desires to concur in the judgment.

Lord WATSON:—

My Lords, this case would have presented a different aspect if the Settled Land Acts, 1882 to 1890, had merely been intended to regulate the respective interests of tenants for life and remaindermen. But the whole tenor of their provisions, as well as the title of the principal Act, indicate that the leading purpose of the Legislature was to prevent the decay of agricultural and other interests occasioned by the deterioration of lands and buildings in the possession of impecunious life-tenants.

In exercising the discretion committed to it by sect. 10, sub-sect. 2, of the Act of 1890, I venture to doubt whether the Court can derive much assistance from the provisions of sect. 53 of the Act of 1882. These prescribe the duty which the life tenant owes to his remainder-men, in cases where he has actually got power

to sell at his own hand. But, in cases like the present, [\* 364] \* the Court has to determine whether he is to have any

power to sell,—a question which, in my opinion, involves other considerations than those arising from the relative positions of the parties having proprietary interests, present and expectant, in the estate. In solving that question, I think the Court is bound

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to take into consideration not only the relative interests of those parties, but the interests of the estate itself, including in that expression the well-being of the persons from whose industrial occupation its rents and profits are derived.

Upon the facts of the case I can add nothing to what has been said by the learned Judges of the Court of Appeal. To refuse consent to a sale of the mansion-house in such circumstances would, in my opinion, be to defeat the main object of the statutes.

My noble and learned friend, Lord HERSCHELL, who has been obliged to leave the House, requested me to state that he entirely concurs in the judgment proposed.

Lord MACNAGHTEN:—

My Lords, in the course of the argument your Lordships were invited to turn to the Settled Estates Acts if you would ascertain the rule which ought to guide the Court in exercising the powers intrusted to it by the Settled Land Act, 1882. Your Lordships, I think, would hardly be disposed to take that course. The Act of 1882 differs from all previous legislation in regard to settled land. It proceeds on different lines, and it has a different object in view. The Settled Estates Acts did not confer or enable the Court to confer on a limited owner powers beyond those ordinarily inserted in a well-drawn settlement. They were no doubt very useful Acts in their way. An application to the Court at a moderate cost was made to serve the purposes of a private estate Act. But the Settled Land Act was founded upon a broader policy and has a larger scope. A period of agricultural depression, which showed no sign of abatement, had given rise to a popular outcry against settlements. The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce, without doing \*away altogether with [\*365] the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act as far as it was possible to protect them. They must be duly considered by the trustees or by the Court whenever the trustees or the Court may be called upon to act. But it is

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evident, I think, that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests. Take the case of heirlooms as an illustration. The sale of heirlooms is authorised. The purchase-money becomes capital money arising under the Act, and may be dealt with accordingly. A sale of heirlooms, therefore, may seriously disturb the interests of persons entitled under the settlement. A remainder-man who would have been absolute owner of heirlooms if there had been no sale may find the heirlooms sold and the purchase-money applied in paying off incumbrances or making improvements on the settled land without any special reservation in his favour. Still the Act authorises the sale, but it intrusts the power of sanctioning the sale to the Court alone, as being, no doubt, likely to take a broader and more independent view than the trustees of the settlement. It seems to me, therefore, that the learned counsel for the appellants were not quite right in saying that the Court ought to put itself exactly in the position of the trustees and consider what prudent trustees would do. I think something more is expected of the Court. Trustees would not be to blame if they were to concentrate their attention on the interests of the persons entitled under the settlement and the wishes of the settlor. It is the duty of the Court — a duty which the Court is not at liberty to omit — also to keep in view the main purpose of the Act from which it derives its powers. This really is all that the Court of Appeal has done, and I think that it has done quite right.

I agree that the appeal must be dismissed with costs.

[\* 366] Lord MORRIS: —

My Lords, I concur in the judgment which has been moved by the LORD CHANCELLOR, and in the reasons which he has assigned for it.

Lord HANNEN: —

My Lords, I also concur.

*Order appealed from affirmed, and appeal dismissed with costs; cause remitted to the Chancery Division.*

Lords' Journals, 9th August, 1892.

#### ENGLISH NOTES.

The resolutions in *Heydon's Case* have been frequently cited, and are always regarded as containing an authoritative exposition of the points to be considered in the interpretation of a statute. See per

Nos. 22, 23.—*Heydon's Case*; *Bruce (Lord Henry) v. Ailesbury (Marquess of)*.—Notes.

BLACKBURN, J., in *Reg. v. Castro* (1874), L. R. 9 Q. B. 360, 43 L. J. Q. B. 105, 30 L. T. 320, 22 W. R. 187; per MANISTY, J., in *Harding v. Prevee* (1882), 9 Q. B. D. 281, 51 L. J. Q. B. 515, 47 L. T. 100, 31 W. R. 42; per Lord SELBORNE, L. C., in *Brodlaugh v. Clarke* (1883), 8 App. Cas. 354, 52 L. J. Q. B. 505, 48 L. T. 681, 31 W. R. 677.

It may be questioned whether the Courts have invariably acted up to the enlightened principles of the resolutions in *Heydon's Case*; or whether the judicial mind, as an interpreter of the legislative, is entirely free from a tendency to perversity. It would be easy to illustrate this remark, if it were worth while to collect all the decisions which the Interpretation Act, 1889, has been found necessary to counteract. Perhaps the decisions under the old Foreign Enlistment Act (before the Act of 1870) are not free from this criticism. See *Attorney-General v. Sillem* (1863, 1864), 2 H. & C. 431, 33 L. J. Ex. 92.

## AMERICAN NOTES.

*Heydon's Case* is cited in Endlich on Interpretation of Statutes, p. 35, and fortified by reference to *Maus v. Logansport, &c. R. Co.*, 27 Illinois, 77; *People v. Greer*, 43 ibid. 213; *Woods v. Mains*, 1 Greene (Iowa), 275; *Cumberland County v. Boyd*, 113 Penn. St. 52; *Sibley v. Smith*, 2 Michigan, 486; *Winslow v. Kimball*, 25 Maine, 493; *Berry v. Clary*, 77 ibid. 482; *Alexander v. Worthington*, 5 Maryland, 471; *Tonnele v. Hall*, 4 New York, 140; *Ruggles v. Illinois*, 108 United States, 526; *Crawfordville, &c. Co. v. Fletcher*, 101 Indiana, 97; *Keith v. Quinney*, 1 Oregon, 364; *Orudoff v. Turman*, 2 Leigh (Virginia), 200; 21 Am. Dec. 608; *Preston v. Drew*, 33 Maine, 558; 51 Am. Dec. 639; *Parvin v. Wimberg*, 130 Indiana, 531; 30 Am. St. Rep. 254.

But these cases also hold that if the language is plain and unmistakable there is no room for interpretation, and the directions of the statute, if constitutional, must be effectuated. *Welch v. Wulsworth*, 30 Connecticut, 149; 79 Am. Dec. 233; *Tyan v. Walker*, 35 California, 634, 95 Am. Dec. 152; *Bloxham v. Consumer's E. L. Co.*, 36 Florida, 519; 29 Lawyers' Rep. Annotated, 507; *Shellenberger v. Ransom*, 31 Nebraska, 61; 28 Lawyers' Rep. Annotated, 564.

"What is within the intention of the makers of a statute is within the statute, though not within the letter; and that which is within the letter of a statute, but not within the intention of the makers, is not within the statute, it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded." *State v. Boyd*, 2 Gill & Johnson (Maryland), 374, cited in *Mayor v. Root*, 8 Maryland, 95; 63 Am. Dec. 692; *People v. Utica Ins. Co.*, 15 Johnson, 353; 8 Am. Dec. 243; *Rutledge v. Crawford*, 91 California, 526; 25 Am. St. Rep. 212; *Tracy v. Troy, &c. R. Co.*, 38 New York, 433; 98 Am. Dec. 54.

A statute may be extended or restrained by an equitable construction, and a case out of the mischief intended to be remedied by a statute may be

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Nos. 22, 23.—*Heydon's Case; Bruce (Lord Henry) v. Ailesbury (Marquess of).*—Notes.

construed to be out of the purview, though it be within the words of the statute. *Blakeney v. Blakeney*, 6 Porter (Alabama), 109; 30 Am. Dec. 574.

In *New Eng. Car Spring Co. v. Baltimore, &c. R. Co.*, 11 Maryland, 81; 69 Am. Dec. 181, coal-cars were held not to be "machines, erected constructed, or repaired within the city of Baltimore," within a mechanic's lien law, the Court construing the law to apply only to fixed and stationary machinery, and not to movable machinery on which the mechanic has at common law a lien for construction or repairs, observing: "There is no sound reason for imputing to the Legislature the intention of extending the operation of the lien law to cases which were not within the mischief sought to be remedied."

"The meaning of the Legislature may be extended beyond the precise words used in the law, or from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed." *United States v. Freeman*, 3 Howard (U. S. Sup. Ct.), 557; *Holmes v. Paris*, 75 Maine, 559; *Bennett v. Am. Ex. Co.*, 83 Maine, 236; 23 Am. St. Rep. 774, the last holding that a statute imposing a penalty upon any person killing, destroying, or having in his possession, between the first days of October and January, more than one moose, two caribou, or three deer, does not prohibit common carriers from having more than three deer in their possession between said days for the purposes of transportation. And so it was held "that a common carrier, having in his possession for transportation short lobsters packed in barrels, was not liable to the penalty denounced against persons who should catch, buy, or sell, or expose for sale, or possess for any purposes," such lobsters between certain days. The Court said the carrier was not bound to break open and examine packages intrusted to him for carriage: "A law requiring such strictness of examination would be an interference with the rights of shippers that would not be tolerated." The Court cited the *Nitro-Glycerine Case*, 15 Wallace (U. S. Sup. Ct.), 524, holding a carrier not liable for injury by explosives in transportation; also *State v. Goss*, 59 Vermont, 266, where an agent of an express company was held not liable as a seller of intoxicating liquors because he received, delivered, and took pay for them.

Frequent application of this principle is made in construing statutes concerning election ballots. For example, a statute enacts that when a ballot bears on the outside any impression, device, color, or thing, or is folded in a distinguishing manner, it must be rejected. This does not relate to mere accidental impressions, such as the offset of the fresh ink from the type from another ballot, or a piece of sealing-wax, or a stain. *Rutledge v. Crawford*, *supra*, and cases cited in note, 25 Am. St. Rep. 218.

To effect the evident purpose of a statute it may be held retroactive, although it does not so in terms direct. *Connecticut M. L. Ins. Co. v. Talbot*, 113 Indiana, 373; 3 Am. St. Rep. 655; *People v. Spicer*, 99 New York, 225; *Larkin v. Saffarans*, 15 Federal Reporter, 147; *Excelsior M. Co. v. Keyser*, 62 Mississippi, 155; *Baldwin v. City of Newark*, 38 New Jersey Law, 158.

The principles of construction in question are applied in this country to constitutional provisions. For example, although the constitutions of the government and the States provide that no person shall be compelled in a criminal case to be a witness against himself, yet he is not so exempt if a

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Nos. 22, 23.—*Heydon's Case*; *Bruce v. Lord Henry, v. Ailesbury (Marquess of)*. — Notes.

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statute provides in a particular case that any person giving evidence against others therein shall be exempt from all prosecution and punishment for the offence in regard to which he testifies. *Ex parte Cohen*, 104 California, 524; 43 Am. St. Rep. 127; *Counselman v. Hitchcock*, 142 United States, 547; *In re Chapman*, 163 ibid. 661.

The most remarkable instance of statutory construction in this country is that by which a murderer is allowed to inherit the estate of his victim under the statutes of distribution and descent. That the murderer may thus take is held in *Sheehanberg v. Ransom*, 41 Nebraska, 631; 25 Lawyers' Rep. Annotated, 561; *Owens v. Owens*, 100 North Carolina, 240; *Deem v. Milliken*, 28 Ohio Law Journal, 357; *Carpenter's Appeal*, 170 Penn. State, 143; 29 Lawyers' Rep. Annotated, 145; 50 Am. St. Rep. 765. The contrary was held in *Riggs v. Palmer*, 115 New York, 505; 12 Am. St. Rep. 819; 5 Lawyers' Rep. Annotated, 340, and substantially in *Insurance Co. v. Armstrong*, 117 United States, 591.

END OF VOL. XIV.







# NOTES ON ENGLISH RULING CASES

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## CASES IN 14 E. R. C.

14 E. R. C. 1, ROBERTSON v. FRENCH, 4 East, 130, 4 Esp. 246, 7 Revised Rep. 535.

### **Construction of insurance contracts.**

Cited in *Cady v. Imperial Ins. Co.* 4 Cliff. 203, Fed. Cas. No. 2,283; *Coit v. Commercial Ins. Co.* 7 Johns. 385, 5 Am. Dec. 282; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Wilkins v. Tobacco Ins. Co.* 30 Ohio St. 317, 27 Am. Rep. 455; *Klett v. Delaware Ins. Co.* 23 Pa. 262; *Home Ins. Co. v. Gwathney*, 82 Va. 923, 1 S. E. 209; *Connecticut F. Ins. Co. v. Tilley*, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. E. 851; *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894; *British America Assur. Co. v. Law*, 21 Can. S. C. 325; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 84,—holding that the terms of policy are to be construed according to their plain, ordinary and popular sense, unless usages of trade have given to them a peculiar sense or meaning; *Universal L. Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532; *United States Mut. Acci. Asso. v. Newman*, 84 Va. 52, 3 S. E. 805,—holding that a contract of insurance is to be governed by the same principles that govern other contracts; *Creighton v. Union M. Ins. Co.* 2 N. S. 195 (dissenting opinion); *Crowell v. Jones*, 17 N. S. 513; *Law v. British American Ins. Co.* 23 N. S. 537; *Wadsworth v. Canadian R. Acci. Ins. Co.* 26 Ont. L. Rep. 55, Ann. Cas. 1913A, 546, 3 D. L. R. 668 (dissenting opinion); *Maritime Bank v. Guardian Assur. Co.* 19 N. B. 297,—on how policies of insurance are to be construed; *Yonkers v. Hoffman F. Ins. Co.* 6 Robt. 316, holding that an inaccurate description or error in instruments of insurance may be corrected by construction the same as in other instruments; *MERCHANTS INS. CO. v. EDMOND & CO.* 17 Gratt. 138, holding that contracts of insurance are to be construed accurately, and neither liberally nor severely, and without favor to either party; *Gillespie v. British America F. & L. Assur. Co.* 7 U. C. Q. B. 108, holding that policy of insurance must be construed according to intention of contracting parties, and not according to the strict and liberal meaning of words.

Cited in note in 14 E. R. C. 45, on construing general terms in policy to include acts and events incidental to adventure.

### **—As to voyage and termini.**

Cited in *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77, holding that policy of insurance to "port of New Orleans" was not to be extended to cover delivery of goods beyond usual wharf; *Union Ins. Co. v. Stoney, Harp. L.*

235, holding that a policy on the goods stipulating "loading at Charleston" and a policy on the vessel "at and from Charleston" are to be construed together to the effect that Charleston is the loading point of the vessel.

— **Written and printed parts of policy.**

Cited in *James v. Lycoming Ins. Co.* 4 Cliff. 272, Fed. Cas. No. 7,182, holding that where part of a contract of insurance is printed and part written and there arises any reasonable doubt as to its meaning, greater effect is given the written part as that is the immediate language and terms of the parties themselves; *Summers Bros. v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; *American Exp. Co. v. Pinckney*, 29 Ill. 392,—holding that when printed form is used, to be filled in by writing, written part will control in construing writing; *Brooke v. Louisiana State Ins. Co.* 4 Mart. N. S. 640, on the written part of a policy of insurance as controlling the printed part; *Edwards v. St. Louis Perpetual Ins. Co.* 7 Mo. 382, holding that where it is stipulated in writing that risk shall attach only to goods indorsed on policy, such indorsement is a condition precedent to right of recovery; *Bargett v. Orient Mut. Ins. Co.* 3 Bosw. 385, holding written warranty "free from average" controls printed one "free from average unless general;" *Howard v. Astor Mut. Ins. Co.* 5 Bosw. 38, holding that the contract of a printed freight policy of insurance containing the written words "on passage money" must be regarded as relating to passage money only; *Leeds v. Mechanics' Ins. Co.* 8 N. Y. 351, holding that in a contract of insurance containing written time limit, the written part shall be given the superior significance and effect; *Livingstone v. Western Assur. Co.* 14 Grant, Ch. (U. C.) 461, holding the written provision in a policy of insurance which showed the plaintiff's interest controlled the printed words; *Thomas v. St. John's M. Ins. Co.* Newfoundl. Rep. (1854-64) 754, holding that words "fish and oil" written on the margin of a policy of insurance on "goods and merchandise" confined the insurance to such goods named in margin.

— **As to warranties in policy.**

Cited with special approval in *Hart v. Standard M. Ins. Co.* L. R. 22 Q. B. Div. 499, 58 L. J. Q. B. N. S. 284, 60 L. T. N. S. 649, 37 Week. Rep. 366, 6 Asp. Mar. L. Cas. 368, holding that the same broad rules of construction apply to the interpretation of a warranty as apply to all commercial documents and that "iron" included steel when used generically.

Cited in *Salts v. Prudential Ins. Co.* 140 Mo. App. 142, 120 S. W. 714, holding that terms "warranty" and "condition precedent" are used interchangeably in insurance law and term warranty may mean condition precedent; *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89, 23 Am. Rep. 198, holding that statements in an application for insurance will be deemed warranties only when they are in fact incorporated into the policy; *Scott v. Quebec Fire Assur. Co.* Stuart (L. C.) 147, holding where there is an express warranty in a policy of insurance, none will be implied.

— **Parol evidence as to meaning.**

Cited in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, holding that parol evidence is not admissible to show waiver in a policy which by its terms requires such waiver to be in writing.

**Construction of contracts in ordinary sense of words.**

Cited with special approval in *Hall v. Rand*, 8 Conn. 560, holding that mercantile contracts containing plain and ordinary words and expressions are to

be interpreted in their popular and obvious sense, and it is only when technical terms are used that evidence is admissible to interpret their meaning.

Cited in *Hogg v. Emerson*, 6 How. 437, 12 L. ed. 505, holding that in construing patents plain and ordinary principles should be applied and not subtleties and technicalities; *Hovey v. Stevens*, 3 Woodb. & M. 17, Fed. Cas. No. 6,746, holding that patent claims should be clear and exact and the language used in the popular sense and meaning and not confined to technical terms; *Moran v. Prather*, 23 Wall. 492, 23 L. ed. 121, holding ordinary plain terms have their ordinary popular meaning and parol evidence is admissible only as to special or technical ones; *Sigsworth v. McIntyre*, 18 Ill. 126, holding that to interpret the terms of a contract free from ambiguous or technical terms is for the court; *Pilmer v. Branch of State Bank*, 16 Iowa. 321, holding evidence was admissible to show a peculiar local meaning of "currency;" *Gillis v. Bailey*, 21 N. H. 149, holding that it is not admissible to allow evidence to go to the jury as to meaning of the words "single dwelling house" where it was not offered to show that such terms were technical; *Dunham v. Kirkpatrick*, 40 Phila. Leg. Int. 318, holding that the term minerals in reservation in deed does not include petroleum oil; *Iddings v. Nagle*, 2 Watts & S. 22, holding that it was not admissible to show by custom that a farm tenant for a year should not have all the agricultural produce to wit, straw; *York County v. Toronto Gravel Road & Concrete Co.* 11 Ont. App. Rep. 765 (separate opinion), on construction of words in their primary sense, unless in the particular instance they must be understood in some peculiar sense, and of expressions having reference to common transactions in their plain, ordinary and popular meaning; *Munn v. Kearns, Newfoundl. Rep. (1854-64) 369*, holding under an agreement for purchase, with the "rise" that would be paid by certain firms the plaintiff would be entitled to the average "rise" paid by such firms.

Cited in *1 Underhill, Land. & T.* 604, on construing covenants in leases by ascertaining general intention.

Distinguished in *Barry v. Morse*, 3 N. H. 132, holding that where a note has been indorsed in blank, evidence is not admissible to show a particular agreement between the parties as to the legal effect of such indorsement.

#### **— Containing printed and written matter.**

Cited in *McKay v. Howard*, 6 Ont. Rep. 135, holding a mortgage distress clause was overcome by a written agreement to look alone to the land; *Comer v. Lehman*, 87 Ala. 362, 6 So. 264, on the rule that where irreconcilable the printed words are to be discarded and the written words alone looked to as expressing the intention of the parties; *McDermott v. Keenan*, 14 Ont. Rep. 687, holding written interest provision in mortgage overcame printed part; *Glynn v. Margetson [1893] A. C. 351, 62 L. J. Q. B. N. S. 466, 1 Reports, 193, 69 L. T. N. S. 1, 7 Asp. Mar. L. Cas. 366*, holding that printed deviation clause in bill of lading yielded to written description of the voyage so far as repugnant.

Cited in *2 Page, Contr.* 1741, on construction of written and printed provisions of contract; *2 Devlin, Deeds*, 3d ed. 1515, on written part of deed controlling where conflict between written and printed portions.

Distinguished in *Ottawa Electric Co. v. St. Jacques*, 1 Ont. L. Rep. 73, holding in the construction of a lease the written and printed terms were to be given the same effect.

#### **— Admissibility of parol evidence.**

Cited in *Bradley v. Washington, A. & G. Steam Packet Co.* 13 Pet. 89, 10 L. ed. 72, holding that parol evidence is admissible in construing a written contract

when without such extrinsic evidence a proper application of the contract to its subject could not be made in the particular case.

**Inception of insurance "at and from" or on goods to be "loaded."**

Cited in *Wells, F. & Co. v. Pacific Ins. Co.* 44 Cal. 397, holding that the clause "from and immediately following the loading" at named ports was not to be construed strictly in an open policy and the risk attached to goods conveyed to their destination in the ship though put aboard at other ports; *Clark v. Higgins*, 132 Mass. 586, holding that the clause "from the loading thereof on board" will be construed strictly as to the port named only when it is incorporated into the contract in such a manner as to be an essential part; *Murray v. Columbia Ins. Co.* 4 Johns. 443, holding that insurance "at and from" Calcutta to New York with liberty to touch and load at Madras did not attach where the voyage began at Madras without going to Calcutta; *Stoney v. Union Ins. Co.* 3 M'Cord, L. 387, 15 Am. Dec. 634 (dissenting opinion), on construction of clause "at and from" a given point; *Murray v. Columbia Ins. Co.* 11 Johns. 312, holding that a policy insuring goods at and from a certain point laden or to be laden does not include old cargo unloaded and then re-loaded in the same vessel at that point; *Campbell v. Canada Ins. Union*, 12 N. S. 21, holding a loss was within the risk excepted in policy where it occurred at a point on the same bay as the prohibited port which had ceased to exist, the port where the loss occurred being substituted therefor; *Horneyer v. Lushington*, 13 E. R. C. 637, 15 East, 46, 3 Campb. 85, 13 Revised Rep. 759, holding that where a policy contains the clause "from the loading thereof aboard the said ship at Gottenburg" the risk will not attach to goods loaded at some other port and brought to Gottenburgs in the said ship.

Cited in note in 13 Eng. Rul. Cas. 582, 586, 587, on time when marine insurance risk attaches.

Distinguished in *Silloway v. Neptune Ins. Co.* 12 Gray, 73, holding that where a policy of insurance covers vessel and cargo "at and from Portsmouth" the risk attaches to goods loaded at Newburyport and brought to Portsmouth.

**Proof of ownership or character of vessel.**

Cited in *Scranton v. Coe*, 40 Conn. 159, holding that as between the parties a bill of sale is not necessary evidence of title of vessel.

**— Registry as evidence.**

Cited in *United States v. Peterson*, 1 Woodb. & M. 305, Fed. Cas. No. 16,037, holding that the fact of mutinous sailors having sailed on an American ship commanded by an American officer is *prima facie* sufficient to render them liable under the laws of the United States without the production in the first instance of any register of the vessel; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716, holding that sworn copy of steamboat register is not of itself evidence of ownership even against those making it under oath; *Fontaine v. Beers*, 19 Ala. 722, holding that evidence of ownership is to be looked for in ship's papers and registration under laws of Congress and that possession and acts of ownership are only presumptive evidence of ownership; *Bulkley v. Derby Fishing Co.* 1 Conn. 571, holding that the mere fact of possession as owners is *prima facie* evidence of ownership even without documentary proof until proof to the contrary is shown; *Starr v. Knox*, 2 Conn. 215, holding that ownership of a vessel is proved as any other personal chattel and the register is not the ordinary or proper evidence of title upon which third persons are expected to rely; *Sharp v. United Ins. Co.* 14 Johns. 201, holding that the ship's register is not *prima facie* evidence of ownership and cannot be offered in evidence, as

against their acts, by persons denying ownership; *Richardson v. Montgomery*, 49 Pa. 203, 22 Phila. Leg. Int. 140, holding that the Act of 1850 does not destroy equitable interests in vessels or require such interests to be manifested in writing in the custom house register; *Schofield v. Anderson*, 31 N. B. 518, holding evidence was admissible to show on the part of the consignee of a ship that the registered owner was not the real owner.

Distinguished in *The Beaver*, Stewart, Vice, Adm. Rep. (N. S.) 173, holding the question of claimant's right to property could not be raised where named in register as owner and the other parties appeared only as agents.

#### **Documentary or parol evidence as respects ships.**

Cited in *Hadden v. People*, 25 N. Y. 373, holding that it is competent to prove the destination of a vessel by parol testimony though there is documentary evidence on the subject in the custom house.

### **14 E. R. C. 30, PELLY v. ROYAL EXCH. ASSUR. CO. Burr. 341.**

#### **Construction of terms of insurance policies.**

Cited in *Maritime Ins. Co. v. M. S. Dollars S. S. Co.* 100 C. C. A. 547, 177 Fed. 127, holding that under marine policy consent of insurer to carrying by vessel of false clearance papers is inferable when policy expressly gave insured permission to run blockade; *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77; *Driggs v. Albany Ins. Co.* 10 Barb. 440; *Stacey v. Franklin F. Ins. Co.* 2 Watts & S. 506,—holding policies are to be construed largely, according to the intention of the parties, and for the indemnity of the assured, and for the advancement of trade; *Field v. Citizens' Ins. Co.* 11 Mo. 50, holding the policy is to be construed liberally for the benefit of the insured; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 30 L.R.A. 719, 53 Am. St. Rep. 658, 42 N. E. 546,—holding the rule is applied to conditions and provisions in policies of insurance, on the ground that their office is to limit the force of the principal obligation; *Aetna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L.R.A.(N.S.) 667, 56 S. E. 643, 9 Ann. Cas. 461, holding a fair and reasonable construction is to be placed on the commonly known "iron-safe clause" requiring the keeping of a set of books of record of business transactions; *Warren v. Springfield F. & M. Ins. Co.* 13 Tex. Civ. App. 466, 35 S. W. 810, holding where the question is whether given words were used in an enlarged or a restricted sense, other things being equal, that construction most beneficial to the promisee should be adopted; *Westfall v. Hudson River F. Ins. Co.* 2 Duer, 490, holding where words are susceptible of two interpretations that which sustains the claim and covers the loss must in preference be adopted; *Dutcher v. Brooklyn L. Ins. Co.* 3 Dill. 87, Fed. Cas. No. 4,202; *Blumer v. Phoenix Ins. Co.* 45 Wis. 622 (dissenting opinion),—on the construction of insurance policies.

Cited in note in 14 Eng. Rul. Cas. 15, on rules for construing insurance policies.

#### **— Practical construction.**

Cited in *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. ed. 452, holding it especially necessary in construing a policy of insurance for the first time, to ascertain whether the contract has received a practical construction by the general consent of the mercantile world; *Pride v. Providence-Washington Ins. Co.* 6 Pa. Dist. R. 227, holding in the determination of what losses and expenses are recoverable upon marine policies much depends upon the meaning which commercial persons and courts have put upon them.

**— In marine policies.**

Cited in *Merchants Ins. Co. v. Edmond & Co.* 17 Gratt. 138, holding marine insurances should be so construed as to sustain the fair intent of the parties, neither enhancing the risks on the one hand, nor on the other hand impairing the indemnities; *Ellery v. New England Ins. Co.* 8 Pick. 14, holding a ship being protected by the insurance while repairing, is protected while repairing by a new and safe mode which has come into use since the insurance was written; *The Monarch v. Marine R. & Dry Dock Co.* 2 Disney (Ohio) 117, holding insurance on cargo on board steamship navigating the Ohio River, covers the cargo while on lighters it being necessary at certain times of year to employ lighters; *Mey v. South Carolina Ins. Co.* 1 Treadway, Const. 339, holding that risk under marine policy risk was not begun, if vessel had not set sail on her intended voyage before injury occurred.

**— Fire insurance on ships.**

Cited in *Hood v. Manhattan F. Ins. Co.* 11 N. Y. 532, holding insurance on the stocks, being built in ship yard, does not include timbers to be used and lying in yard, even though prepared especially for that vessel.

**— Description of location or use of property.**

Cited in *Niagara F. Ins. Co. v. Elliott*, 85 Va. 962, 17 Am. St. Rep. 115, 9 S. E. 694, holding the words "contained in" should be construed to restrict the liability of the insurer to the use of the property at the place specified; *Parsons v. Massachusetts F. & M. Ins. Co.* 6 Mass. 197, 4 Am. Dec. 115, holding goods protected as well in boats employed as auxiliary to the legitimate purposes of the voyage, as they were on board the ship; *Benton v. Farmers' Mut. F. Ins. Co.* 102 Mich. 281, 26 L.R.A. 237, 60 N. W. 691, holding hay tools and implements in a new barn not included in insurance on an old barn and its contents which had been kept up for years before erection of new barn; *Richardson v. Clark*, 15 Me. 421, on property included by the "vessel with apparel and furniture;" *Lyons v. Providence Washington Ins. Co.* 14 R. I. 109, 51 Am. Rep. 364, holding that removal of furniture from house described in policy to another house where they were destroyed by fire avoided policy.

Cited in notes in 26 L.R.A. 238, on location of movable property as affecting fire insurance; 13 Eng. Rul. Cas. 630, as to when contract of marine insurance is terminated.

Distinguished in *Taunton Copper Co. v. Merchant's Ins. Co.* 22 Pick. 108, holding insurance on goods on board a ship does not cover the goods carried on deck in absence of express stipulation to that effect; *Dow v. Whetten*, 8 Wend. 160, holding a policy of insurance on goods shipped out and on the proceeds thereof home, does not cover the identical goods shipped out while being brought back on return trip; *Cooledge v. Continental Ins. Co.* 67 Vt. 14, 30 Atl. 798, holding where contract insured the property "while located and contained as described herein, and not elsewhere" this made the contract conditional and it cannot be declared upon as a promise to insure generally.

**Admissibility of proof of usage of trade in construction.**

Cited in *Crousillat v. Ball*, 3 Yeates, 375, 2 Am. Dec. 375, on usage of trade as admissible to explain doubts in regard to proper construction of insurance policies; *Cameron v. Domville*, 17 N. B. 647, holding all persons engaged in the trade must take notice of the usage of that particular trade; *Bowen v. Newell*, 2 Duer, 584, holding usage of banks of a state not to allow days of grace on time checks admitted in another state where action was brought.

**— Insurance risks.**

Cited in *Le Roy v. United Ins. Co.* 7 Johns. 343, holding the insurer takes the risk under a supposition that what is usual and necessary will be done; *MERCHANTS' & MFG. INS. CO. V. SHILLITO*, 15 Ohio St. 559, 86 Am. Dec. 491, holding the underwriter is presumed to have notice of the usages of the trade, in reference to which he contracts; *Mey v. South Carolina Ins. Co.* 3 Brev. 329, holding that under policy "from Amsterdam," insurers were liable for loss occurring at Texel, where it was custom for vessels to stop there to take on part of cargo.

**— Ships and sea usages.**

Cited in *Coggeshall v. American Ins. Co.* 3 Wend. 283, holding where goods were not on board when lost, the liability of insurers must depend upon the known course of trade, and established usage, with which insurers are to be supposed conversant; *MERCHANTS' & MFRS. INS. CO. V. SHILLITO*, 15 Ohio St. 559, 86 Am. Dec. 491, holding deckload so carried according to general usage was covered; *Hazleton v. Manhattan Ins. Co.* 11 Biss. 210, 12 Fed. 159, holding it a necessarily implied part of a contract of marine insurance, that in the conduct of the ship's business, she would conform to the usages of the trade in which she was engaged; *United States v. The Reindeer*, Fed. Cas. No. 16,145, holding usage may be proved, to explain whether a voyage has been properly pursued or not under an insurance; *Spooner v. Western Assur. Co.* 38 U. C. Q. B. 62, holding liability is fixed by knowledge of a usage of carrying deck cargoes on our inland lakes; *Wright v. Holecombe*, 6 U. C. C. P. 531, on control of a prima facie contract to carry from one place to another by well established usage of trade to touch at another port; *Palmer v. Blackburn*, 14 E. R. C. 486, 1 Bing. 61, 25 Revised Rep. 599, 7 J. B. Moore, 339, holding in questions on policies of insurance, the course has always been to ascertain the custom of merchants.

**Effect of deviation from the route contemplated by insurance.**

Cited in *Hood v. Nesbitt*, 1 Yeates, 114, 1 Am. Dec. 265; *Hood v. Nesbit*, 2 Dall. 137, 1 L. ed. 321, 1 Am. Dec. 265, holding a deviation with or without the owner's consent will discharge the insurers; *Parsons v. Manufacturers' Ins. Co.* 16 Gray, 463, holding to pursue the voyage insured in conformity with a fixed usage of trade is not a deviation; *Audenreid v. Mercantile Mut. Ins. Co.* 60 N. Y. 482, 19 Am. Rep. 204, holding if vessel designedly and unnecessarily goes in the least out of her course without the consent of the underwriters the risk is substantially changed and the insurance terminated; *McCall v. Sun Mut. Ins. Co.* 66 N. Y. 505, holding that in absence of words excluding it, course of navigation prescribed by usage must be pursued.

Cited in *1 Hutchinson, Car.* 3d ed. 332, on carrier's right to show that loss by public enemy would have happened without his negligence or deviation.

**Effect of failure to use diligence in repair of vessel.**

Cited in *American Ins. Co. v. Ogden*, 20 Wend. 287, holding that if assured fails in his duty of due diligence in management and repair of vessel, contract of insurance is still good in relation to every point in which he has not by negligence or misconduct made risk his own.

**Presumption as to liability on insurance policy.**

Cited in *Schultz v. Pacific Ins. Co.* 14 Fla. 73, holding the presumption is with the insured, after proof of loss.

**Burden of proof where insurer claims exemption.**

Cited in *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613, holding the loss

being admitted, the burden of proof is on the insurer, claiming exemption from liability, to show that it falls within the exception.

**14 E. R. C. 46, CAMDEN v. COWLEY, 1 W. Bl. 417.**

**Time at which policy attaches and terminates.**

Cited in *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583, holding if at time of assumption of risk vessel is abroad in a foreign port, or expected to arrive at such port in the course of the voyage, the policy by the word "at" will attach upon vessel and cargo from arrival at such port.

Cited in note in 13 E. R. C. 713, as to when risk commences on insurance of chartered freight.

**14 E. R. C. 50, WATSON v. CLARK, 1 Dow. P. C. 336, 14 Revised Rep. 73.**

**Warranty of seaworthiness.**

Distinguished in *Coons v. Aetna Ins. Co.* 19 U. C. C. P. 235, holding where the contract is expressed in a time policy no implication of an implied warranty of seaworthiness at the commencement exists; *Walsh v. Washington Marine Ins. Co.* 3 Robt. 202, holding the assured only warrants the ship seaworthy at the beginning of the voyage.

**Presumption as to seaworthiness.**

Cited in *Deshon v. Merchants' Ins. Co.* 11 Met. 199, holding it assumed as a fact, in the absence of fraud, and the insured has the benefit of the presumption; *Walsh v. Washington M. Ins. Co.* 32 N. Y. 427, holding where inability of ship to perform her voyage becomes evident, soon after leaving port and she founders, without adequate cause, the presumption is that the inability existed, before setting sail; *Wright v. Orient Mut. Ins. Co.* 6 Bosw. 269, holding that verdict in favor of assured, found upon evidence raising presumption of unseaworthiness of vessel, will not be set aside as contrary to evidence; *Lunt v. Boston Marine Ins. Co.* 19 Blatchf. 151, 6 Fed. 562, holding seaworthiness is assumed as a fact, in the absence of countervailing facts; *Myles v. Montreal Ins. Co.* 20 U. C. C. P. 283, holding burden of proof on the insured to prove seaworthiness where vessel without apparent cause rapidly settles down in a summer sea, with a light breeze; *Irvine v. Nova Scotia M. Ins. Co.* 8 N. S. 510, holding if ship becomes unnavigable the presumption shall be that this proceeds from the age and rottenness, or other defects of ship unless it is made to appear to have been occasioned by sea damage; *Costello v. St. John's M. Ins. Co. Newfoundl. Rep. (1854-64) 127*, holding it a question for jury to determine whether vessel was seaworthy, where shortly after leaving port she was found to be leaking so as to necessitate her abandonment; *Hathaway v. Sun Mut. Ins. Co.* 8 Bosw. 33, holding it for court to determine whether enough peril has been proved to carry case to jury, after which it becomes a question of fact whether it be such as to establish unseaworthiness.

**Nature of implied warranties in voyage policies.**

Cited in *Van Valkenburgh v. Astor Mut. Ins. Co.* 1 Bosw. 61, holding implied warranties in voyage policies are conditions precedent, and peculiarly so when the policy attaches at the original port of departure.

**14 E. R. C. 58, DIXON v. SADLER, 5 Mees. & W. 405, 9 L. J. Exch. N. S. 48, affirmed in 8 Mees. & W. 895, 11 L. J. Exch. N. S. 435, 14 E. R. C. 63.**

**Effect of negligence of master and crew on liability of the insurer.**

Cited in *Sherwood v. General Mut. L. Ins. Co.* 1 Blatchf. 251, Fed. Cas. No.

12,776, holding underwriters liable though loss results from a collision due to negligence of insured vessel; *Mathews v. Howard Ins. Co.* 11 N. Y. 9, holding that collision due to negligence of master and mariners is peril within policy insuring against perils of sea or lake; *Trinder A. & Co. v. Thames & M. M. Ins. Co.* [1898] 2 Q. B. 114, 67 L. J. Q. B. N. S. 666, 78 L. T. N. S. 485, 8 Asp. Mar. L. Cas. 373, 3 Com. Cas. 123, 14 Times L. R. 386, 46 Week. Rep. 561; *National Ins. Co. v. Webster*, 83 Ill. 470; *Mathews v. Howard Ins. Co.* 13 Barb. 234,—holding where the course of the loss is a peril insured against fact the master and crew were negligent is immaterial; *Smith v. New York C. R. Co.* 24 N. Y. 222 (dissenting opinion), on effect of negligence of master and crew on the insurance; *Hathaway v. Sun Mut. Ins. Co.* 8 Bosw. 33, holding a mere error of judgment on his part does not exonerate them; *Street v. Augusta Ins. & Bkg. Co.* 12 Rich. L. 13, 75 Am. Dec. 714, holding, if vessel is seaworthy and the master and crew competent, no negligence of master and crew, not baratrous, leading to a peril and loss within the policy, will relieve the insurers from liability; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78, holding the insurer liable on a policy of insurance on wharf-boat destroyed by running ice though the insured was negligent in not removing the boat during season of running ice; *Almon v. Providence-Washington Ins. Co.* 16 N. S. 533, holding negligence in dealing with a ship after struck will not relieve the insurer; *Davidson v. Burnand*, L. R. 4 C. P. 117, 38 L. J. C. P. N. S. 73, 19 L. T. N. S. 782, 17 Week. Rep. 121, holding no distinction is to be made between a loss occasioned by the negligence of the crew of the vessel insured and one caused by negligence of the crew of another vessel; *The Duero*, L. R. 2 Adm. & Eccl. 393, 38 L. J. Prob. N. S. 69, 22 L. T. N. S. 37, holding the underwriter can insure against the negligence of the master.

Cited in note in 14 Eng. Rul. Cas. 344, on liability of insurer for loss of vessel by fire due to negligence.

#### **Liability of insurer for loss partaking of neglect.**

Cited in *Johnston v. Dominion Grange Mut. F. Ins. Co.* 23 Ont. App. Rep. 729, holding in absence of an express condition negligence is one of the risks ordinarily insured against; *Western Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Ohio) 325, holding loss by mere fault and negligence of assured or his servants without fraud or design, is a loss within the policy; *Gore v. Farmer's Mut. F. Ins. Co.* 48 N. H. 41, 2 Am. Rep. 168, 97 Am. Dec. 572, holding a loss by fire on land, occasioned by the mere fault and negligence of the insured party, his servants or agents, without fraud or design, is a loss protected by the policy.

Distinguished in *Cudworth v. South Carolina Ins. Co.* 4 Rich. L. 416, 55 Am. Dec. 692, holding where the plaintiff is owner as well as master the insurer is not liable; *Harkley v. Provincial Ins. Co.* 18 U. C. C. P. 335, on effect of plaintiff being owner as well as master.

#### **Stipulated liability as to losses producable by neglect.**

Cited in *Harnden v. Proctor*, 9 U. C. Q. B. 592, holding the same rule as in insurance cases should apply in case of a bill of lading where there is an exception against loss by dangers of navigation.

#### **Test of seaworthiness.**

Cited in *Grant v. Lexington F. L. & M. Ins. Co.* 5 Ind. 23, 61 Am. Dec. 74, on what constitutes a proper equipment for a voyage; *Cobb v. New England Mut. M. Ins. Co.* 6 Gray, 192, holding the question of seaworthiness relates to the date at which the insurance attaches; *The Arctic Bird*, 109 Fed. 167, holding seaworthiness implies a "fit state of repairs, equipment and crew, to en-

counter the ordinary perils of the voyage insured, at the time of sailing upon it;" *Collins Bay Rafting & Forwarding Co. v. Kaine*, 29 Can. S. C. 247 (dissenting opinion), on what constitutes seaworthiness; *Hedley v. Pinkney & S. S. S. Co.* [1892] 1 Q. B. 52, 61 L. J. Q. B. N. S. 179, 66 L. T. N. S. 71, 40 Week. Rep. 113, 7 Asp. Mar. L. Cas. 135, 56 J. P. 308; *The Titania*, 19 Fed. 101,—holding it means a fit state, as to repairs, equipment and crew, to encounter the ordinary perils of the contemplated voyage; *Hedley v. Pinkney & S. S. S. Co.* [1894] A. C. 222, 63 L. J. Q. B. N. S. 419, 70 L. T. N. S. 630, 42 Week. Rep. 497, 7 Asp. Mar. L. Cas. 135, holding the word "seaworthy" is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port; *Thin v Richards* [1892] 2 Q. B. 141, 62 L. J. Q. B. N. S. 39, 66 L. T. N. S. 584, 40 Week. Rep. 617, 7 Asp. Mar. L. Cas. 165, holding where voyage is entire from one port to another the vessel must be seaworthy when she leaves the first port and in condition to bear all the ordinary vicissitudes of the voyage.

#### **Implied warranty of seaworthiness as part of contract of insurance.**

Cited in *Bouillon v. Lupton*, 14 E. R. C. 72, 33 L. J. C. P. N. S. 37, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 8 L. T. N. S. 575, 11 Week. Rep. 966, on implied warranty of seaworthiness as part of contract of marine insurance.

#### **Unseaworthiness after outset of voyage.**

Cited in *Nelson v. Suffolk Ins. Co.* 8 Cush. 477, 54 Am. Dee. 770, holding, if the vessel, the master, officers and crew, and equipment are competent and sufficient at the commencement of the voyage, the assured has done all he contracted to do; *Copeland v. New England M. Ins. Co.* 2 Met. 432, holding fact that master becomes incompetent does not render the ship unseaworthy or relieve the insurer.

#### **Warranty of seaworthiness as to successive voyages or parts of voyage.**

Cited in *The Vortigern* [1899] P. 140, 68 L. J. Prob. N. S. 49, 47 Week. Rep. 437, 80 L. T. N. S. 382, 15 Times L. R. 259, 4 Com. Cas. 152, 8 Asp. Mar. L. Cas. 523, holding where, owing to necessity of coaling, a steam vessel avails itself of liberty of stopping at ports on the way, the voyage is a broken one and ship must be made seaworthy at commencement of voyage after each stop; *Howard v. Orient Mut. Ins. Co.* 2 Robt. 530, holding the insurer is relieved from liability where the vessel leaves an intermediate port, whether a port of call or of distress, in an unseaworthy condition; *Quebec M. Ins. Co. v. Commercial Bank*, L. R. 3 P. C. 234, 39 L. J. P. C. N. S. 53, 22 L. T. N. S. 559, 18 Week. Rep. 769, holding there is a different degree of seaworthiness required by law, according to the different stages of the voyage which the vessel has to pass through.

#### **— Presumption as to.**

Cited in *Morrison v. Nova Scotia M. Ins. Co.* 28 N. S. 346, holding where vessel sinks without apparent cause there is no inference that she was unseaworthy at beginning of voyage.

#### **Deviation as affecting time policies.**

Cited in *Audenreid v. Mercantile Mut. Ins. Co.* 60 N. Y. 482, 19 Am. Rep. 204, holding the question of deviation cannot ordinarily arise upon time policies.

#### **Remote cause of loss as affecting liability.**

Cited in *Sturm v. Atlantic Mut. Ins. Co.* 6 Jones & S. 281, holding it is the proximate, not the remote cause, which is to be regarded in fixing the liability.

14 E. R. C. 63, SADLER v. DIXON, 8 Mees. & W. 895, 11 L. J. Exch. N. S. 435, affirming 5 Mees. & W. 405, 9 L. J. Exch. N. S. 48, 14 E. R. C. 58.

#### **Negligence as affecting liability of underwriters.**

Cited in Fireman's Ins. Co. v. Powell, 13 B. Mon. 311; Mathews v. Howard Ins. Co. 13 Barb. 234; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Street v. Augusta Ins. & Bkg. Co. 12 Rich. L. 13, 75 Am. Dec. 714; Almon v. Providence-Washington Ins. Co. 16 N. S. 533; Sherwood v. General Mut. L. Ins. Co. 1 Blatchf. 251, Fed. Cas. No. 12,776; Hale v. Washington Ins. Co. 2 Story, 176, Fed. Cas. No. 5,916,—holding where a loss occurs from a peril insured against, there is a loss to be borne by the underwriters, although it may have been occasioned by the negligence of the master and crew; Johnston v. Dominion Grange Mut. F. Ins. Co. 23 Ont. App. Rep. 729, holding in the absence of an express condition, negligence is one of the risks ordinarily insured against; Marsh v. Citizen's Ins. Co. 2 Pittsb. 273, 9 Pittsb. L. J. 57, holding mere negligence of assured, however great the degree, will not discharge the underwriters; West India & P. Teleg. Co. v. Home & C. M. Ins. Co. L. R. 6 Q. B. Div. 51, 50 L. J. Q. B. N. S. 41, 43 L. T. N. S. 420, 29 Week. Rep. 92, 4 Asp. Mar. L. Cas. 341, holding negligence of those who ought to have examined and attended to the state of a boiler was immaterial; Hathaway v. Sun Mut. Ins. Co. 8 Bosw. 33, holding a mere error of judgment on his part does not exonerate them; Harnden v. Proctor, 9 U. C. Q. B. 592, holding where bill of lading contains an exception against "dangers of navigation," negligence or unskillfulness are to be considered as within such perils as in insurance cases.

Cited in notes in 1 L.R.A.(N.S.) 1100, on effect of voluntary exposure to peril or marine policy; 14 Eng. Rul. Cas. 344, on liability of insurer for loss of vessel by fire due to negligence.

Distinguished in Augusta Ins. Co. and B. Co. v. Abbott, 12 Md. 348, holding an unexcusable delay amounting to a deviation will discharge a policy on a cargo, though owner of cargo has no interest in the brig and no control over her.

#### **Perils of the sea.**

Cited in Porter, Bills of L. 207, on what are perils of the sea.

#### **Implied warranty of seaworthiness.**

Cited in Hoxie v. Pacific Mut. Ins. Co. 7 Allen, 211, holding it assumed in policies for a specified time as well as in those for specified voyages that there was a warranty by the assured of the seaworthiness of the ship or vessel; Dudgeon v. Pembroke, L. R. 1 Q. B. Div. 96, holding an implied warranty of seaworthiness exists in case of a time policy, as where insurance, though for twelve months, was on a voyage policy form; Gibson v. Small, 4 H. L. Cas. 353, 1 C. L. R. 363, 17 Jur. 1131, 14 E. R. C. 94, holding that in a time policy there is no implied warranty of seaworthiness.

Cited in note in 14 Eng. Rul. Cas. 124, on implied warranty of seaworthiness in time policy.

#### **— Unseaworthiness after outset of voyage.**

Cited in Morrison v. Nova Scotia M. Ins. Co. 28 N. S. 346, holding the implied warranty of seaworthiness satisfied in case of a voyage policy by proof that ship was seaworthy when she sailed on the voyage out.

Distinguished in Gillespie v. British America F. & Life Assur. Co. 7 U. C. Q. B. 108, holding where policy provides that vessel shall be sound and sea-

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worthy and safe for navigation at all times during continuance of policy, there is an implied warranty of seaworthiness during whole course of voyage.

14 E. R. C. 72, BOUILLOU v. LUPTON, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 33 L. J. C. P. N. S. 37, 8 L. T. N. S. 575, 11 Week. Rep. 966.

**Warranty of seaworthiness as to sea voyages of river boats.**

Cited in *Thebaud v. Phoenix Ins. Co.* 52 Hun, 495, 1 Silv. Sup. Ct. 449, 5 N. Y. Supp. 619, holding the implied warranty of seaworthiness is broken and policy of insurance avoided where a river boat, insured for an ocean voyage, begins the voyage without being fitted for such voyage.

Cited in note in 14 Eng. Rul. Cas. 176, on necessity of strict compliance with statement written in margin of policy.

**— Question for jury.**

Cited in *Thebaud v. Great Western Ins. Co.* 155 N. Y. 516, 50 N. E. 284, holding the question, as to whether a river vessel, covered by a policy of marine insurance was, or was not at the time seaworthy, was one of fact for the jury.

14 E. R. C. 86, GIBSON v. SMALL, 1 C. L. Rep. 363, 4 H. L. Cas. 353, 17 Jur. 1131.

**Implied warranty of seaworthiness.**

Cited in *Jones v. Insurance Co.* 2 Wall. Jr. 278, Fed. Cas. No. 7,470, holding that seaworthiness is not condition implied in regard to time policies; *Pierce v. Winsor*, 2 Cliff. 18, Fed. Cas. No. 11,150, holding that where damage is caused by article, of dangerous character which was unknown to either owner or shipper, loss must be borne by shipper; *The Caledonia*, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537, holding a warranty against latent defects in the vessel implied in contracts of affreightment; *Pope v. Swiss Lloyd Ins. Co.* 4 Fed. 153, on the implied warranty that ship is seaworthy; *Van Valkenburgh v. Astor Mut. Ins. Co.* 1 Bosw. 61, on implied warranty of seaworthiness in time or voyage policies; *Steel v. State Line S. S. Co.* 4 E. R. C. 697, L. R. 3 App. Cas. 72, 37 L. T. N. S. 333, 3 Asp. Mar. L. Cas. 516, holding in contracts for sea carriage there is an implied warranty that the ship shall be fit for the purpose named in the bill of lading; *Kopitoff v. Wilson*, L. R. 1 Q. B. Div. 377, 45 L. J. Q. B. N. S. 436, 34 L. T. N. S. 677, 24 Week. Rep. 706, 3 Asp. Mar. L. Cas. 163, holding the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is seaworthy; *Stanton v. Richardson*, L. R. 7 C. P. 421, 5 Eng. Rul. Cas. 632, L. R. 9 C. P. 390, 41 L. J. C. P. N. S. 180, 43 L. J. C. P. N. S. 230, 33 L. T. N. S. 193, 24 Week. Rep. 324, 45 L. J. C. P. N. S. 78, 3 Asp. Mar. L. Cas. 23, holding the shipowner under obligations to supply a ship reasonably fit to carry the cargo stipulated for in the charter party; *Readhead v. Midland R. Co.* 5 E. R. C. 436, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379, 36 L. J. Q. B. N. S. 181, 38 L. J. Q. B. N. S. 169 (dissenting opinion), on implied warranty of fitness of carriage of railroad company for purpose of carrying passengers.

**— In case of time policy.**

Referred to as leading case in *Dudgeon v. Pembroke*, L. R. 1 Q. B. Div. 96, L. R. 2 App. Cas. 284, 14 Eng. Rul. Cas. 105, 46 L. J. Q. B. N. S. 409, 36 L. T. N. S. 382, 25 Week. Rep. 499, 3 Asp. Mar. L. Cas. 393, holding no warranty of seaworthiness implied in time policy.

Cited in *Dallam v. Insurance Co.* 6 Phila. 15, 22 Phila. Leg. Int. 220, holding

in case of a time policy there is no implied warranty of seaworthiness at commencement of the risk; *Hathaway v. Sun Mut. Ins. Co.* 8 Bosw. 337, holding in case of a time policy there is no warranty of seaworthiness except that of departure; *Hughes v. Mercantile Mut. Ins. Co.* 44 How. Pr. 351, holding a time policy antedated by the insured, without the words "lost or not lost" covers a loss the same as though issued on the day of the date; dissenting opinion in *Irvine v. Nova Scotia M. Ins. Co.* 8 N. S. 510; *Union S. S. Co. v. Drysdale*, 32 Can. S. C. 379,—on the implied warranty of seaworthiness.

Distinguished in *Rouse v. Insurance Co.* Fed. Cas. No. 12,089, holding an implied warranty of seaworthiness attaches when insurance by a time policy is made on a vessel then in her home port.

Disapproved in *Hoxie v. Pacific Mut. Ins. Co.* 7 Allen, 211, holding an implied warranty of seaworthiness exists in case of a time policy on a ship where at commencement of risk ship was in port where repairs could have been made.

#### **Test of seaworthiness.**

Cited in *The Titania*, 19 Fed. 101; *The Prussia*, 35 C. C. A. 625, 93 Fed. 837,—holding the warranty of seaworthiness is that the vessel is in such a state, as to repairs, equipment and crew, as to be able to encounter the ordinary perils of the adventure; *The Rover*, 33 Fed. 515, holding only a reasonable fitness for the service designed is required; *Dawson v. Home Ins. Co.* 21 U. C. C. P. 20, holding where vessel is shown to have been seaworthy at commencement of voyage and began to leak after encountering a squall, it is not necessary to supply reason for the sinking.

14 E. R. C. 105, *DUDGEON v. PEMBROKE*, L. R. 2 App. Cas. 284, 3 Asp. Mar. L. Cas. 393, 46 L. J. Exch. N. S. 409, 36 L. T. N. S. 382, 25 Week. Rep. 499, reversing the decision of the Exchequer Chamber, reported in L. R. 1 Q. B. Div. 96, which reverses the decision of the Court of Queen's Bench, reported in 2 Asp. Mar. L. Cas. 323, 43 L. J. Q. B. N. S. 220, 31 L. T. N. S. 31, L. R. 9 Q. B. 581, 22 Week. Rep. 914.

#### **Limitation of writing by printed provisions in policy.**

Cited in *Hagan v. Scottish Union & Nat. Ins. Co.* 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862, holding courts will not endeavor to limit effect of written language by resort to printed provisions in policy, which if applied would render the written portion useless.

Distinguished in *Ottawa Electric Co. v. St. Jacques*, 1 Ont. L. Rep. 73, holding in a contract for leasing of property the written and printed provisions are to be read together.

#### **Construction of policies.**

Cited in *Snyder v. Groff*, 8 Pa. Dist. R. 291, holding the intention of the contracting parties once ascertained, overrides any particular phrase apparently at variance with it; *Wadsworth v. Canadian R. Acci. Ins. Co.* 3 D. L. R. 668, 26 Ont. L. Rep. 55, Ann. Cas. 1913A, 546, holding that where insurance policy contains clause intended to limit liability under certain circumstances to fractional amount of sum payable, such clause is to be construed most strongly against insurer.

#### **Warranty of seaworthiness in case of time policy.**

Cited in *Phoenix Ins. Co. v. Anchor Ins. Co.* 4 Ont. Rep. 524, holding no warranty of seaworthiness can be implied in case of a time policy.

Cited in *Hughes*, Adm. 59, on seaworthiness as implied condition of marine insurance on vessel, cargo or freight.

**Construction of term "Perils of the sea."**

Cited in *Morrison v. Nova Scotia M. Ins. Co.* 28 N. S. 346, on nature of loss to come within expression "perils of the sea."

**Negligence as affecting a recovery on policy of insurance.**

Cited in *Kane v. Hibernia Ins. Co.* 39 N. J. L. 697, 23 Am. Rep. 239, holding knowledge and wilfulness and a loss resulting directly and immediately from such wrongful act, are the essential elements of a defense that loss was caused by wilful act of the assured; *Trinder, A. & Co. v. Thames & M. M. Ins. Co.* [1898] 2 Q. B. 114, 67 L. J. Q. B. N. S. 666, 78 L. T. N. S. 485, 46 Week. Rep. 561, 8 Asp. Mar. L. Cas. 373, 3 Com. Cas. 123, 14 Times L. R. 386, holding nothing short of dolus in its proper sense will defeat the right of the assured to recover in respect of a loss of which but for such dolus the proximate cause would be a peril of the sea.

Distinguished in *Richelieu & O. Nav. Co. v. Boston M. Ins. Co.* 26 Fed. 596, holding the underwriter exonerated under the ordinary policy where steamer equipped with a defective compass is driven in a dense fog at full speed in violation of a local statute; *Ballantyne v. Mackinnon* [1896] 2 Q. B. 455, 65 L. J. Q. B. N. S. 616, 75 L. T. N. S. 95, 45 Week. Rep. 70, 8 Asp. Mar. L. Cas. 173, holding where ship negligently short of coal is compelled to engage a trawler to tow her to port cost of such service is not included in perils of the sea for which underwriters are liable.

The decision of the Court of Queen's Bench was cited in *Taber v. China Mut. Ins. Co.* 131 Mass. 239, holding fact of unfitness of vessel to be repaired is owing in part to previous defective condition affords no ground of reduction in computing the degree of the injury, if perils insured against render her unseaworthy; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78, holding that failure of insured to remove property insured to place of safety constituted neither fraud nor negligence, where property insured was wharf-boat, tackle, etc., lying in harbor.

**Proximate cause as determining liability.**

Cited in *Atlantic, G. & P. Co. v. Philippine Islands*, 219 U. S. 17, 55 L. ed. 70, 31 Sup. Ct. Rep. 138, to the point that in insurance cases courts refuse to look behind immediate cause to remote negligence of insured; *Northwest Transp. Co. v. Boston M. Ins. Co.* 41 Fed. 793, holding where a stranded vessel was scuttled to save her from a storm which began after the stranding, the storm was the proximate cause of the loss; *Musgrave v. Mannheim Ins. Co.* 32 N. S. 405, on unseaworthiness as an active force in bringing about loss; *West India & P. Teleg. Co. v. Home & C. M. Ins. Co.* L. R. 6 Q. B. Div. 51, 50 L. J. Q. B. N. S. 41, 43 L. T. N. S. 420, 29 Week. Rep. 92, 4 Asp. Mar. L. Cas. 341, holding though unseaworthiness was a cause sine qua non of the loss, the explosion of boiler was the proximate cause and recovery could be had on the time policy.

The decision of the Court of Queen's Bench was cited in *Toms v. Whitby*, 35 U. C. Q. B. 195, holding the defendants who permitted highway to remain in a defective condition should not be permitted to say to one not in fault, the loss resulted from loss of control of horse.

**Invalidity of insurance where purpose of voyage is illegal.**

The decision of the Court of Queen's Bench was cited in note in 13 E. R. C. 560, on invalidity of insurance on ship or goods for illegal voyage.

14 E. R. C. 125, *FURTADO v. ROGERS*, 3 Bos. & P. 191, 6 Revised Rep. 752.

**Effect of war on contracts between citizens of belligerent states.**

Cited in *Griswold v. Waddington*, 16 Johns. 438, holding all contracts cease to exist between citizens of different countries upon the beginning of hostilities between the two countries; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, on application of rule as to contracts void by reason of public policy: *Insurance v. Knox*, 25 Phila. Leg. Int. 357, holding that the existence of war does not annul contracts between citizens of the respective warring countries made prior to its breaking out, but only suspends the remedy during the war.

**— Insurance on ships.**

Cited in *Sands v. New York L. Ins. Co.* 50 N. Y. 626, 10 Am. Rep. 535, holding contracts for the insurance of the enemy's property, of affreightment and of commercial copartnership, are avoided thereafter by the breaking out of the war; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244, holding a contract to "protect" goods of a citizen of a belligerent state with his neutral name against capture is illegal and void as repugnant to every principle of public policy; *Tait v. New York L. Ins. Co.* 1 Flipp. 288, Fed. Cas. No. 13,726, holding insurance which indemnifies a public enemy against loss in time of war is unlawful and terminates upon beginning of hostilities; *Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741, holding it unlawful to insure enemies' property, yet a policy of that kind issued previous to a war may be qualified so as to save it from entire destruction.

Cited in note in 13 Eng. Rul. Cas. 557, on invalidity of insurance on ship or goods for illegal voyage.

Distinguished in *New York L. Ins. Co. v. Clopton*, 7 Bush, 179, 3 Am. Rep. 290, holding where the insurance was an executed entirety for the entire "term" and payment of loss was merely a single act of a continuing contract the war did not avoid the contract.

**Construction of general words in policy on enemy goods.**

Cited in *Drefontein Consol. Gold Mines v. Janson* [1900] 2 Q. B. 339 [1901] 2 K. B. 419 [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 51 Week. Rep. 142, 7 Com. Cas. 268, 18 Times L. R. 796, 69 L. J. Q. B. N. S. 771, 48 Week. Rep. 619, 83 L. T. N. S. 79, 16 Times L. R. 438, 5 Com. Cas. 296, 70 L. J. K. B. N. S. 881, 49 Week. Rep. 660, 85 L. T. N. S. 104, 17 Times L. R. 601, 6 Com. Cas. 198, holding if the seizure of a shipment of gold by a foreign government could not be lawfully insured against general words in the policy ought not to be held to cover it.

**— Effect of capture.**

Disapproved in *MERCHANTS INS. CO. v. EDMOND & CO.* 17 Gratt. 138, holding capture of goods as enemy's property does not relieve the insurer from liability on policy where insurer and insured were citizens of this state.

**Inurement of enemy's property to crown.**

Cited in *Brown v. United States*, 8 Cranch, 110, 3 L. ed. 504, to the point that all choses in action belonging to enemy are forfeited to crown; *The Emulous*, 1 Gall. 563, Fed. Cas. No. 4,479, holding by the common law choses in action belonging to an enemy are forfeitable to the crown; *Hanger v. Abbott*, 6 Wall. 532, 18 L. ed. 939, holding the right of a creditor to sue on debt is not extinguished but merely suspended during the war; *Brown v. United States*, 8 Cranch, 110, 3 L. ed. 504 (dissenting opinion), on effect of war on choses of action belonging to the enemy.

**Effect of a declaration of war on intercourse with enemy.**

Cited in *Esposito v. Bowden*, 24 E. R. C. 399, 7 El. & Bl. 763, 3 Jur. N. S. 1209, 27 L. J. Q. B. N. S. 17, 5 Week. Rep. 732, holding the force of a declaration of war has been held equal to that of an act of Parliament prohibiting intercourse with the enemy.

14 E. R. C. 139, *AUBERT v. GRAY*, 3 Best & S. 163, 9 Jur. N. S. 714, 32 L. J. Q. B. N. S. 50, 7 L. T. N. S. 468, 11 Week. Rep. 27.

**Acts of own government imputable to the assured.**

Cited in *Janson v. Driefontein Consol. Mines* [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 51 Week. Rep. 142, 18 Times L. R. 796, 7 Com. Cas. 268, holding under ordinary circumstances a loss occasioned by the embargo placed on goods by the assured's own government does not avoid the policy; *Driefontein Consol. Gold Mines v. Janson* [1901] 2 K. B. 419, 70 L. J. K. B. N. S. 881, 49 Week. Rep. 660, 85 L. T. N. S. 104, 17 Times L. R. 604, 6 Com. Cas. 198 (dissenting opinion), on acts of his government as imputed to the insured.

**Construction of clause, "arrests, restraints and detainments of rulers."**

Cited in *Robinson Gold Min. Co. v. Alliance Ins. Co.* [1901] 2 K. B. 919, 70 L. J. K. B. N. S. 892, 85 L. T. N. S. 419, 50 Week. Rep. 109, 6 Com. Cas. 244, on construction of that clause.

**Effect of existence of war upon contracts.**

Cited in notes in 14 E. R. C. 136, on the effect of war upon marine insurance contracts; 13 E. R. C. 558, on invalidity of insurance on ship or goods for illegal voyage.

14 E. R. C. 149, *RICH v. PARKER*, 4 Revised Rep. 552, 7 T. R. 705.

**Necessity of insured ship carrying evidences of her neutrality.**

Cited in *Sleight v. Hartshorne*, 2 Johns. 531, on effect to be given a sea letter; *Baring v. Clagett*, 14 E. R. C. 155, 3 Bos. & P. 201, 6 Revised Rep. 759, holding if ship be warranted American she must in every respect be so documented as to entitle her to the privileges of the American flag; *Bell v. Carstairs*, 14 E. R. C. 319, 14 East, 374, 12 Revised Rep. 557, 2 Campb. 543, 12 Revised Rep. 557, holding where proximate cause of condemnation of ship as a prize arose from failure to carry passport showing neutrality underwriters are released.

**Effect to be given sentence of a foreign court of admiralty.**

Cited in *Vandenheuvel v. United Ins. Co.* 2 Johns. Cas. 127, holding that in action on policy of insurance, containing warranty of American property, sentence of foreign court of admiralty, condemning property as lawful prize, was conclusive evidence as to character of property and of breach of warranty; *Goix v. Low*, 1 Johns. Cas. 341, holding a sentence condemning a ship as a lawful prize by a foreign court of admiralty, is conclusive evidence of breach of warranty that the ship is American; *Vandenheuvel v. United Ins. Co.* 2 Ca. Cas. 217, on effect to be given a sentence of a foreign court of admiralty.

**Negligence of master as affecting marine insurance.**

Cited in *Cleveland v. Union Ins. Co.* 8 Mass. 308, holding where negligence of master in not retaining ship's register led to loss of neutral ship it released the underwriters; *Fulton v. Lancaster Ohio Ins. Co.* 7 Ohio, pt. 2, p. 5, holding where remote cause of loss was negligence of master and crew there can be no recovery on policy of river insurance—there being no clause against barratry.

14 E. R. C. 155, *BARING v. CLAGETT*, 3 Bes. & P. 201, 6 Revised Rep. 759 affirmed in 5 East, 398, 7 Revised Rep. 719.

#### **Warranty of nationality of ship.**

Cited in *Barker v. Phenix Ins. Co.* 8 Johns. 307, 5 Am. Dec. 339, holding insurance upon "The good American ship, called the Rodman" amounts to a warranty that the ship is American; *Coolidge v. New York Firemen Ins. Co.* 14 Johns. 308, holding that warranty that ship is American property imports that she is accompanied with all accustomed and necessary documents evincing that character.

#### **Protection afforded our unregistered vessels.**

Disapproved in *Griffith v. Insurance Co. of N. A.* 5 Binn. 464, holding our unregistered vessels, carrying proper sea letters, were protected from capture by our treaty with France.

#### **Conclusiveness of foreign judgment.**

Cited in note in 20 L.R.A. 670, on conclusiveness of judgment rendered in foreign country.

14 E. R. C. 171, *DE HAHN v. HARTLEY*, 1 Revised Rep. 221, 1 T. R. 343, affirmed by the Exchequer Chamber in 2 T. R. 186.

#### **Marginal writings in policy as warranty.**

Cited in *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 22 Am. Dec. 567, holding if the warranty appear on the face of the policy, though written in the margin it is sufficient; *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534, holding writing upon a policy at time of signing and adopted by the signature, whether words are in the margin or written transversely, is part of the contract.

#### **Essential difference between a "warranty" and a "representation."**

Cited in *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75, holding one essential difference between a representation and a warranty is that the former is collateral to while the latter appears on the face of the policy; *Augusta Ins. Co. v. Banking Co.* 12 Md. 348, holding while the one must be literally fulfilled, it is sufficient if the former be substantially complied with; *Bryce v. Lorillard F. Ins. Co.* 3 Jones & S. 394, holding words descriptive of the precise locality of storage of goods a warranty; *Hendricks v. Commercial Ins. Co.* 8 Johns. 1 (dissenting opinion), on the nature and effect of warranties.

#### **Construction of a warranty.**

Cited in *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54, holding when the covenant is express, it must be strictly complied with.

#### **— In insurance.**

Cited in *Trench v. Chenango County Mut. Ins. Co.* 7 Hill, 122, holding a warranty in an insurance policy must be strictly complied with; *Gillespie v. British America F. & Life Assur. Co.* 7 U. C. Q. B. 108, holding express warranties on part of the insured must be strictly complied with; *Supreme Lodge, O. C. K. v. McLaughlin*, 108 Ill. App. 85, holding a warranty by its very terms precludes inquiry into the materiality of the stipulated facts; *Day v. Orient Mut. Ins. Co.* 1 Daly, 13, holding the law attaches no importance to the degree of violation of a warranty; *Forbush v. Western Massachusetts Ins. Co.* 4 Gray, 337, holding it a condition precedent which estopped the assured from denying or asserting anything contrary to his express warranty; *Wilson v. Hampden F. Ins. Co.* 4 R. I. 159, holding in a contract of insurance, a "warranty" is a condi-

tion the performance of which is essential to validity of the contract: *Wells, F. & Co. v. Pacific Ins. Co.* 44 Cal. 397, holding even an overwhelming necessity, a force which was irresistible, would not excuse the forwarding of the advices by agent where deemed an express warranty; *Barney v. Maryland Ins. Co.* 5 Harr. & J. 139, holding where policy of insurance, contained agreement "not to abandon, in case of capture, until condemned," abandonment before ship is condemned is a breach of warranty; *Wilkins v. Tobacco F. & M. Ins. Co.* 2 Cin. Sup. Ct. Rep. 204, holding where attachment of risk at all depends upon the performance of a condition precedent by the assured a literal compliance will be sufficient; *Cowan v. Phenix Ins. Co.* 78 Cal. 181, 20 Pac. 408, holding a breach of an affirmative warranty consists in the falsehood of the affirmation, when made, of a promissory warranty; *Etna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L.R.A.(N.S.) 667, 56 S. E. 643, 9 Ann. Cas. 461, holding the so called "iron-safe clause" requiring the keeping of a set of books is a promissory warranty which must be complied with; *Roth v. City Ins. Co.* 6 McLean, 324, Fed. Cas. No. 12,084, holding where survey and representations of the property are accepted on representations of the assured, misrepresentation or omission affecting risk avoid the policy; *Grant v. Lexington F. L. & M. Ins. Co.* 5 Ind. 23, 61 Am. Dec. 74, holding a stipulation in the policy that the boat should be manned with a specified number of hands was a binding condition and required strict performance; *Levi v. New Orleans Mut. Ins. Asso.* 2 Woods, 63, Fed. Cas. No. 8,290, holding a stipulation in policy that "it is warranted and agreed by insured that the steamer shall be navigated in strict compliance with stated regulations of Congress" is a warranty and must be strictly complied with.

Distinguished in *Maryland Casualty Co. v. Gehrmann*, 96 Md. 634, 54 Atl. 678, holding the common-law rule changed by statute to the extent that the untrue statement must relate to some matter material to the risk to work a forfeiture of policy; *White v. Providence Sav. Life Assur. Soc.* 163 Mass. 108, 27 L.R.A. 398, 39 N. E. 771, holding, by reason of statute, the contract will be held valid, unless the misstatement, if made in the negotiation of the contract, was actually made with intent to deceive, or actually increased the risk.

Limited in *Western Assur. Co. v. Redding*, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. 708, holding where "safe clause" of policy was substantially complied with a recovery may be had.

#### **— Warranty as to number and ability of crew.**

Cited in *Dwyer v. Mutual L. Ins. Co.* 72 N. H. 572, 58 Atl. 502, holding falsity of a statement which the parties have expressly warranted to be true, or agreed shall constitute a material part of the policy, avoids it; *Coulson v. Ontario F. & M. Ins. Co.* 6 U. C. C. P. 63, on effect of using mere laborers instead of seamen on right to recover on insurance.

#### **Representation in application for insurance.**

Cited in *Lunt v. Boston Marine Ins. Co.* 19 Blatchf. 151, 6 Fed. 562, holding a substantial compliance of representations is sufficient; *Nicoli v. American Ins. Co.* 3 Woodb. & M. 529, Fed. Cas. No. 10,259, holding representations made to secure insurance as where agent reads a set of statements made elsewhere, are to be treated as representations and are dehors the policy; *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1061, holding where policy states it is based on representations made by insured in his application parol evidence is admissible to identify what the writing in the policy refers to; *Clark v. Manufacturers' Ins. Co.* 2 Woodb. & M. 472, Fed. Cas. No. 2,829, holding it competent

to show by extrinsic evidence what representations were which are referred to in body of policy, as being a condition of recovery.

**Recovery back of money paid under mistake.**

Cited in Keener Quasi-Contr. 51, on recovery back of money paid under mistake where retention is against conscience.

14 E. R. C. 179, BLACKETT v. ROYAL EXCH. ASSUR. CO. 2 Cromp. & J. 244, 1 L. J. Exch. N. S. 101, 2 Tyrw. 266.

**Admissibility of usage in construction of contract.**

Cited in Leach v. Beardslee, 22 Conn. 404, holding usage cannot control or vary the clear and unequivocal stipulations of a contract, but will be controlled by them; Menage v. Rosenthal, 175 Mass. 358, 56 N. E. 579; Higgins v. Moore, 34 N. Y. 417; Delaplane v. Crenshaw, 15 Gratt. 457; Mason v. Hartford F. Ins. Co. 29 U. C. Q. B. 585; Troop v. Union Ins. Co. 32 N. B. 135; Lillard v. Kentucky Distilleries & Warehouse Co. 67 C. C. A. 74, 134 Fed. 168; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; Hearne v. New England Mut. M. Ins. Co. 20 Wall. 488, 22 L. ed. 395, 7 Legal Gaz. 57 (affirming 3 Cliff. 318, Fed. Cas. No. 6,301),—holding usage is never admissible to contradict what is plain in a written contract; McCulsky v. Klosterman, 20 Or. 108, 10 L.R.A. 785, 25 Pac. 366, holding it cannot be used as evidence to supersede or contradict a positive and definite provision of a contract; Globe Mill. Co. v. Minneapolis Elevator Co. 44 Minn. 153, 46 N. W. 306, holding a local custom cannot be proved to contradict a contract; Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609, holding it must not conflict with settled rules of law, nor go to defeat essential terms of the contract; Remy v. Healy, 161 Mich. 266, 126 N. W. 202, 21 Ann. Cas. 74, holding that evidence is inadmissible to show fixed custom of manufacture of goods so as to imply a warranty that they would be so manufactured, none existing at law; Swamscot Mach. Co. v. Partridge, 25 N. H. 369, holding it cannot prevail where repugnant to the express contract of the parties; Coquard v. Kansas City Bank, 12 Mo. App. 261, holding evidence of custom of a place inadmissible against one of another place where it is not shown that he knew of and contracted with reference to it; Perkins v. Franklin Bank, 21 Pick. 483, holding the construction of a statute is a matter of law, and when clear and explicit, cannot be controlled by custom; Hardy v. Fairbanks, 2 N. S. 432, holding where contract of sale is of No. 1 salmon usage is inadmissible to show sale was of such goods as an inspector marked No. 1 salmon; McGivern v. Provincial Ins. Co. 9 N. B. 64, on admissibility of usages of trade in construction of terms of contract; R. B. Gage Mfg. Co. v. Woodward, 17 R. I. 464, 23 Atl. 16, holding evidence of trade custom inadmissible where terms of contract are unequivocal.

Cited in note in 14 Eng. Rul. Cas. 44, 47, on admissibility of evidence of custom or understanding of merchants to explain ambiguous expressions in policy.

Cited in 2 Mecham Sales, 1099, on express warranty as excluding usage; 1 Beach Contr. 167, on proof of local usage to contradict a contract; 1 Beach Contr. 926, on right to vary plain terms of contract by custom; 1 Beach Contr. 892, on admissibility of usage to explain doubtful contract.

Distinguished in Wausau Boom Co. v. Dunbar, 75 Wis. 133, 43 N. W. 739, holding in absence of a specific agreement of handling logs in booms evidence of usage and custom and course of dealing was admissible.

Limited in Myers v. Sarl, 14 E. R. C. 656, 30 L. J. Q. B. N. S. 9, 3 El. & El.

306, 7 Jur. N. S. 97, 9 Week. Rep. 96, holding evidence of usage admissible to show "weekly accounts" did not cover extra work.

**— In insurance.**

Cited in Mutual Ben. L. Ins. Co. v. Ruse, 8 Ga. 534; St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co. 5 Bosw. 238,—holding that force and effect of unambiguous agreement between insurance companies cannot be altered by proof that there is usage and custom not to require its performance; Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. 108, holding the insurer presumed to know the usage of carrying certain kinds of property on deck when from its nature it is usually so carried; Mutual Assur. Soc. v. Scottish U. & N. Ins. Co. 84 Va. 116, 10 Am. St. Rep. 819, 4 S. E. 178, holding where contract calls for a certain notice of cancellation of policy by the insurers, it is immaterial whether notice was given according to custom or not; Sperry v. Springfield F. & M. Ins. Co. 26 Fed. 234, holding proof of usage or custom in keeping dynamite cannot be shown where contract expressly stipulates that keeping of dynamite in building will avoid the policy; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207, holding a contract requiring a notice to be given to the insured cannot be varied by evidence of usage or custom.

**Parol evidence to vary written contract.**

Cited in The Delaware (The Delaware v. Oregon Iron Co.) 14 Wall. 579, 20 L. ed. 779, holding parol evidence of agreement to carry goods on deck is inadmissible where bill of lading imports a contract to carry under deck; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534, holding it is not admissible to add to or engrafft upon the contract new stipulations; Hall v. Ocean Ins. Co. 21 Pick. 472, holding the insurers *prima facie* liable for loss of boat from stern of ship upon which insurance is carried, and parol evidence is inadmissible to vary liability.

Cited in 1 Hutchinson Car. 3d ed. 180, on right to vary implied obligations of bill of lading by parol.

**Construction of insurance policy.**

Cited in Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. 108, holding that policy on goods, in general terms, on board ship, does not protect goods laden on deck, unless such risk is expressly taken; Westfall v. Hudson River F. Ins. Co. 2 Duer, 490, holding that when words of insurance policy are susceptible of two interpretations, that which will sustain claim under policy, must in preference be adopted.

Cited in note in 14 E. R. C. 18, on rules for construing insurance policies.

**Construction of words of exception.**

Cited in Airey v. Merrill, 2 Curt. C. C. 8, Fed. Cas. No. 115; Palmer v. Warren Ins. Co. 1 Story, 360, Fed. Cas. No. 10,698,—holding words of exception are to be construed most strongly against the party, for whose benefit they are introduced; Chandlers v. St. Paul, F. & M. Ins. Co. 21 Minn. 85, 18 Am. Rep. 385; United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805,—holding terms of exemption of insurer from liability are to be construed most strongly against the insurer where doubtful as to meaning; Wright v. Williams, 20 Hun. 320, holding where left in doubt that construction most beneficial to promisee should be adopted; Hawthorne v. Canadian Casualty & Boiler Ins. Co. 14 Ont. L. Rep. 166, holding where language used in policy is wholly that of the insurer, it will be most strongly taken against him where doubtful in meaning.

**— Of clause "warranted free from all average."**

Cited in Canton Ins. Office v. Woodside, 33 C. C. A. 63, 61 U. S. App. 214,

90 Fed. 301, holding the clause, "warranted free from all average" is considered in the nature of an exception to the liability of the insurer, and is construed strictly against him.

**Aggregation of several losses to make up percent of risk covered by insurance.**

Cited in *Stewart v. Merchants' M. Ins. Co.* L. R. 14 Q. B. Div. 555, L. R. 16 Q. B. Div. 619, 55 L. J. Q. B. N. S. 81, 53 L. T. N. S. 892, 34 Week. Rep. 208, 5 Asp. Mar. L. Cas. 506; *Paddock v. Commercial Ins. Co.* 104 Mass. 521,—holding successive losses may be added together to make up the requisite per cent; *Donnell v. Columbia Ins. Co.* 2 Sumn. 366, Fed. Cas. No. 3,987, holding successive losses on cargo amounting in the aggregate to more than 5 per cent during voyage are not within the scope of the exception; *Matheson v. Equitable M. Ins. Co.* 118 Mass. 209, 19 Am. Rep. 441, holding where a partial loss occurs and vessel is repaired and subsequently a total loss occurs the insurers are liable for both losses.

**Liability of insurers.**

Cited in *Leitch v. Atlantic Mut. Ins. Co.* 66 N. Y. 100, holding the insurers can only be held to those risks for which they have voluntarily and knowingly undertaken; *Atkinson v. Great Western Ins. Co.* 4 Daly, 1, holding the stowing of goods on deck an enhancement of risk such as to discharge the underwriters, in absence of provision to that effect; *Cornwall v. Halifax Bkg. Co.* 35 N. B. 398, holding a policy was for widow's benefit regardless of necessity that administrator sue on it.

**What constitutes total loss.**

Cited in *Wallerstein v. Columbian Ins. Co.* 3 Robt. 528 (dissenting opinion), on total loss of merchandise as absolute destruction of it by wreck of ship, although later resoled by insurers in worthless condition.

**Time to estimate loss.**

Cited in *Lidgett v. Secretan*, L. R. 6 C. P. 616, 40 L. J. C. P. N. S. 257, 24 L. T. N. S. 942, 19 Week. Rep. 1088, 1 Asp. Mar. L. Cas. 95, holding the loss became fixed, and a right of action accrued to the plaintiffs at the expiration of the policy.

**Construction of reservation in deed as exception.**

Cited in *Farquharson v. Barnard Argue Roth Stearns Oil & Gas Co.* 25 Ont. L. Rep. 93, holding that reservation or exception, in conveyance of land of, "all mines and quarries of metals or minerals and all springs of oil in or under said land, whether discovered or not" did not include natural gas.

14 E. R. C. 187, *BURNETT v. KENSINGTON*, 1 Esp. 416, Peake, N. P. Add. Cas. 71, 4 Revised Rep. 424, 7 T. R. 210.

**Construction of clause "unless ship be stranded, sunk or burnt."**

Cited in *London Assurance v. Companhia De Moagens Do Barreiro*, 15 C. C. A. 379, 28 U. S. App. 439, 68 Fed. 247, holding that exception in words "Free of particular average unless vessel is sunk, burned, stranded, or in collision," ceases to operate as soon as collision has occurred; *London Assur. Co. v. Companhia de Moagens*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785 (affirming 28 U. S. App. 439, 68 Fed. 247, 15 C. C. A. 379), holding the company liable under the general words in policy, if loss occurred although the stranding did not result in the loss; *Padelford v. Boardman*, 4 Mass. 548, on construction of the clause, "unless the ship be stranded;" *Hotchkiss v. Commercial Mut. Ins. Co.*

1 Robt. 489, on distributive construction of "free from average unless general, or the ship be stranded;" The Glenlivet [1893] P. 164, 62 L. J. Prob. N. S. 55, 68 L. T. N. S. 860, 41 Week. Rep. 671, holding where memorandum "warranted free from average unless general, or ship be stranded, sunk, or burnt" it was not necessary to prove damage was occasioned by the burning, if it caused an interruption of the voyage; The Alsace Lorraine [1893] P. 209, 62 L. J. Prob. N. S. 107, 1 Reports, 632, 69 L. T. N. S. 261, 42 Week. Rep. 112, 7 Asp. Mar. L. Cas. 362, holding where goods are not on board at time of stranding the exception as to stranding in memorandum "warranted free from particular average unless ship is stranded" does not apply; Thames & M. Ins. Co. v. Pitts [1893] 1 Q. B. 476, 5 Reports, 168, 68 L. T. N. S. 524, 41 Week. Rep. 346, 7 Asp. Mar. L. Cas. 302, holding where goods were in lighters at time of stranding of ship there is not a stranding such as will let in an average damage under such memorandum.

**Right to claim total loss where portion of goods remains in specie.**

Disapproved in Depeyster v. Sun Mut. Ins. Co. 17 Barb. 306, holding there can be no recovery for a total loss where a portion of hides insured remained and were sold as damaged hides.

14 E. R. C. 200, WELLS v. HOPWOOD, 3 Barn. & Ad. 20.

**Meaning of "stranded" within memorandum.**

Cited in Letchford v. Oldham, L. R. 5 Q. B. Div. 538, 49 L. J. Q. B. N. S. 458, 28 Week. Rep. 789, holding where existence of a bank unknown to pilot prevented ship reaching the berth she otherwise would have safely arrived at, the stranding was within the policy.

Criticized in De Mattos v. Saunders, L. R. 7 C. P. 570, 27 L. T. N. S. 120, 20 Week. Rep. 801, 1 Asp. Mar. L. Cas. 377, holding where ship by reason of bad weather loses her anchors and masts and is towed by salvors to a bank out of course of voyage where further injury results, there is a stranding within meaning of memorandum.

14 E. R. C. 215, LEWIS v. RUCKER, 2 Burr. 1167.

**Computation and measure of partial or average loss.**

Cited in New York & C. Mail S. S. Co. v. Royal Exch. Assur. 145 Fed. 713, holding that under marine policy for stated amount, against loss of freight "on board or not on board" company's liability is limited in case of partial loss to proportion of face of policy, that amount of actual loss bears to amount of freight which would have been earned had voyage been completed; London Assur. Co. v. Companhia de Moagens, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785, on the computation of a particular average loss; Cory v. Boylston F. & M. Ins. Co. 107 Mass. 140, 9 Am. Rep. 14, holding in computing a partial loss under a policy of marine insurance return duties are not to be deducted from the amount to which the insurers are to contribute.

**— On open policy.**

Cited in LeRoy v. United Ins. Co. 7 Johns. 343, on how the damages under an open policy may be ascertained; Usher v. Noble, 14 E. R. C. 439, 12 East, 639, 11 Revised Rep. 505, holding that the rule for estimating a partial loss of goods upon an open policy is by taking the proportional difference between the selling price of the sound and that of the damaged part of the goods at the port of delivery, and applying that proportion with reference to such estimated value at the loading part to the damaged portion of the goods.

**— Under a valued policy.**

Referred to as leading case in *Clark v. United F. & M. Ins. Co.* 7 Mass. 365, 5 Am. Dec. 50, on the adjustment of partial losses under a valued policy.

Cited in *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 304, holding that upon partial loss on valued policy on ship, cost of repairs when made in measure of indemnity against insurers, each insurer being liable for that proportion of amount of its insurance which cost of repairs bears to policy value; *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513, 5 Am. Rep. 162, holding the measure of damages under a valued policy for a partial loss would be a proportionate part of the fixed valuation as found by finding the difference between the market value of the sound grain and the damaged grain; *Harris v. Eagle F. Ins. Co.* 5 Johns. 368, holding under a valued policy to recover for a partial loss a recovery would be had for the property lost according to the valuation of the entire property; *Natchez Ins. Co. v. Buckner*, 4 How. (Miss.) 63; *Lawrence v. New York Ins. Co.* 3 Johns. Cas. 217; *Whitney v. American Ins. Co.* 3 Cow. 210; *Newlin v. Insurance Co.* 1 Phila. 273, 8 Phila. Leg. Int. 239, 5 Clark. 116; *Evans v. Commercial Mut. Ins. Co.* 6 R. I. 47; *Irving v. Manning*, 1 E. R. C. 23, 6 C. B. 391; *Brown v. Cunard S. S. Co.* 147 Mass. 58, 16 N. E. 717,—on the measure of damages for a partial loss under a valued policy.

Distinguished in *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 304, holding upon a partial loss on valued policy on ship the cost of repairs when made is the measure of indemnity.

**— On under valued goods.**

Cited in *Steamship Balmoral Co. v. Marten* [1901] 2 K. B. 896, 70 L. J. K. B. N. S. 1018, 50 Week. Rep. 35, 85 L. T. N. S. 389, 17 Times L. R. 765, 6 Com. Cas. 298, holding the measure of damages under a valued policy for the loss of a ship under valued was by taking the proportion of the general average loss that policy bore to the real value.

**Adjustment of loss where specific separate portion of insured property is undamaged.**

Cited in *Havens v. Germania F. Ins. Co.* 123 Mo. 403, 26 L.R.A. 107, 45 Am. St. Rep. 570, 27 S. W. 718, holding where part of the machinery of a mill destroyed by fire had been removed pending improvements, the loss would not be considered a partial one but the value of such improvements deducted from the amount of the policy.

**Valued policy, purpose of valuation.**

Cited in *Funke v. Orient Mut. Ins. Co.* 6 Jones & S. 349, on the purpose of a valuation in a policy of the property covered thereby; *Pritchett v. Insurance Co. of N. A.* 3 Yeates, 458, on the nature of a valued policy of insurance.

**— Overvaluation of property.**

Cited in *Sturm v. Atlantic Mut. Ins. Co.* 63 N. Y. 77, on overvaluation as affecting the validity of a valued policy.

**— Conclusiveness of valuation fixed in policy.**

Cited in *Voisin v. Providence Washington Ins. Co.* 51 App. Div. 553, 65 N. Y. Supp. 333; *Griswold v. Union Mut. Ins. Co.* 3 Blatchf. 231, Fed. Cas. No. 5,840,—on valued policy as settling the true value of the property insured as between the insurer and insured; *Bruce v. Jones*, 14 E. R. C. 189, 1 Hurlst. & S. 769, 32 L. J. Exch. N. S. 132, 9 Jur. N. S. 628, 17 L. T. N. S. 748, 11 Week. Rep. 371, holding the valuation fixed in the policy fixed the valuation as between the insurer and insured although a different valuation was fixed in other policies.

**Separate valuation on separate parcels as not being separate insurance.**

Cited in *Newlin v. Insurance Co. of N. A.* 5 Clark (Pa.) 116, holding that separate valuation in policy of insurance of each parcel, bale or package is not equivalent to separate insurance of each parcel, bale or package.

**Proof of insurable interest.**

Cited in *Richardson v. Home Ins. Co.* 21 U. C. C. P. 291, holding the mortgagee of a vessel named in the policy as assured might recover under the policy where he had insured the mortgagor's interest, on parol evidence of such fact.

14 E. R. C. 222, *BARKER v. JANSON*, 37 L. J. C. P. N. S. 105, L. R. 3 C. P. 303, 17 L. T. N. S. 473, 16 Week. Rep. 399.

Cited in *Potter v. Rankin*, L. R. 3 C. P. 562, 37 L. J. C. P. N. S. 257, 18 L. T. N. S. 712, 16 Week Rep. 1049, 1 Eng. Rul. Cas. 70, L. R. 5 C. P. 341, 39 L. J. C. P. N. S. 147, historically upon the same disaster and loss.

**What is valued policy.**

Cited in *Insurance Co. v. Willey*, 212 Mass. 75, 98 N. E. 677, holding that valued policy is one where parties fix definite value of property insured.

**Conclusiveness of valuation fixed in policy.**

Cited in *The Livingstone*, 122 Fed. 278, holding the value of a ship as fixed by a valued marine policy was conclusive upon the parties; *Voisin v. Providence Washington Ins. Co.* 51 App. Div. 553, 65 N. Y. Supp. 333; *Sturm v. Atlantic Mut. Ins. Co.* 63 N. Y. 77; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 56 L.R.A. 159, 62 N. E. 338; *Lidgett v. Secretan*, L. R. 6 C. P. 616, 40 L. J. C. P. N. S. N. S. 257, 24 L. T. N. S. 942, 19 Week. Rep. 1088, 1 Asp. Mar. L. Cas. 95; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475,—on the conclusiveness of the valuation fixed in the valued policy.

Cited in *Hughes Adm.* 82, on valuation fixed in marine policy as binding though different from actual value.

**Total loss.**

Cited in *Churchill v. Nova Scotia M. Ins. Co.* 26 Can. S. C. 65 (affirming 28 N. S. 52), holding there was a constructive total loss where the vessel was beached to prevent sinking and it could not be repaired at such place and the cost of repairs would exceed the value of the vessel; *Anchor M. Ins. Co. v. Keith*, 9 Can. S. C. 483, holding a recovery might be had as for a total loss where a vessel was so injured that she could not be taken to port where the necessary repairs could be executed; *Woodside v. Globe M. Ins. Co.* [1896] 1 Q. B. 105, 65 L. J. Q. B. N. S. 117, 73 L. T. N. S. 626, 44 Week. Rep. 187, 8 Asp. M. C. 118, holding a recovery might be had as for a total loss where a vessel was stranded and the cost of repairs would have been greater than her value when repaired and afterwards she was destroyed by fire; *Phoenix Ins. Co. v. McGhee*, 18 Can. S. C. 61 (affirming 28 N. B. 45), on the right to recover as for a total loss.

Cited in *Hughes Adm.* 78, on actual total loss of insured vessel.

14 E. R. C. 232, *HARMAN v. KINGSTON*, 3 Campb. 150, 13 Revised Rep. 775.

**Declaration of interest to fix open policy of marine insurance.**

Cited in *Insurance Co. v. Willey*, 212 Mass. 75, 98 N. E. 677, holding that insurer must be notified of invoice as required by law, in order to make policy which is in for valued policy take effect as such; *Kennebec Co. v. Augusta Ins. Bkg. Co.* 6 Gray, 214, holding an open policy of insurance, on goods "lost or

not lost on board of any steamer or steamers" covered a loss of goods on a vessel en voyage before the assured had notified the insurer that such goods were to be covered by the policy; Edwards v. St. Louis Perpetual Ins. Co. 7 Mo. 382, holding under a policy stipulating "indorsements on this policy to be evidence of property," the insured could only recover where the indorsement was made previous to the loss.

#### **State of war as suspending contracts.**

Cited in Cohen v. New York Mut. L. Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522, holding a condition in a life policy forfeiting it in case of nonpayment of premiums is suspended during the existence of the war; Hardy v. De Leon, 5 Tex. 211, on the existence of a state of war as suspending the rights of parties to contract during continuance thereof.

#### **Judicial ascertainment of terms of insurance after loss.**

Cited in Sun Mut. Ins. Co. v. Wright, 23 How. 412, 16 L. ed. 529, holding the question of the settlement of rate of premium is for the judiciary where the parties cannot agree.

14 E. R. C. 234, GLEDSTANES v. ROYAL EXCH. ASSUR. CORP. 5 Best. & S. 797, 11 Jur. N. S. 108, 34 L. J. Q. B. N. S. 30, 11 L. T. N. S. 305, 13 Week. Rep. 71.

#### **Declaration of goods under open policy after loss.**

Cited in Arnold v. Pacific Mut. Ins. Co. 78 N. Y. 7, on right to make declaration of goods under open policy after loss; Stephens v. Australasian Ins. Co. L. R. 8 C. P. 18, 42 L. J. C. P. N. S. 12, 27 L. T. N. S. 585, 21 Week. Rep. 228, 1 Asp. Mar. L. Cas. 458, upholding declaration made after loss where by mistake goods were shipped at consignee's risk of which mistake he did not sooner learn and there being no fraud.

Cited in notes in 8 L.R.A.(N.S.) 854, on liability of reinsurer; 13 Eng. Rul. Cas. 330, on necessity of specifying in policy the interest of the assured.

14 E. R. C. 247, KIDSTON v. EMPIRE MARINE INS. CO. L. R. 2 C. P. 357, 36 L. J. C. P. N. S. 156, 16 L. T. N. S. 119, 15 Week. Rep. 769, affirming the decision of the Court of Common Pleas, reported in L. R. 1 C. P. 535, 12 Jur. N. S. 665.

#### **Items recoverable under suing and laboring clauses.**

Cited in Cory v. Boylston F. & M. Ins. Co. 107 Mass. 140, 9 Am. Rep. 14, holding under a suing and laboring clause the insurers are liable for a proportion of reasonable expenses incurred in preserving the subject insured; Alexander v. Sun Mut. Ins. Co. 51 N. Y. 253, holding under a suing and laboring clause the insurer is not liable for expenses incurred in making temporary repairs made at a time when the vessel was safe in port; Pride v. Providence-Washington Ins. Co. 6 Pa. Dist. R. 227, holding under the suing and laboring clause in a policy of marine insurance the assured might recover expenses incurred in defending a claim which the underwriter would have had to pay if it had been proved; Dixon v. Whitworth, L. R. 4 C. P. Div. 371, 48 L. J. C. P. N. S. 538, 40 L. T. N. S. 718, 28 Week. Rep. 184, 4 Asp. Mar. L. Cas. 326, holding same in case of expenses paid by assured for which underwriter would have been liable; The Brigella [1893] P. 189, 62 L. J. Prob. N. S. 81, 1 Reports, 616, 69 L. T. N. S. 834, 7 Asp. Mar. L. Cas. 337, on expenses recoverable under suing and

laboring clauses; *Johnston v. Salvage Asso.* L. R. 19 Q. B. Div. 458, 57 L. T. N. S. 218, 36 Week. Rep. 56, 6 Asp. Mar. L. Cas. 167, on sue and labor clause as one for reimbursement and not for indemnity.

Cited in note in 14 Eng. Rul. Cas. 485, on effect of sue and labor clause.

Distinguished in *Aitchison v. Lohre*, 14 E. R. C. 448, L. R. 4 App. Cas. 755, 49 L. J. Q. B. N. S. 123, 41 L. T. N. S. 323, 28 Week. Rep. 1, 4 Asp. Mar. L. Cas. 168 (reversing a decision which reversed L. R. 3 Q. B. Div. 558), denying recovery under the clause of salvage or of repairs made in preference to abandonment for constructive total loss.

The decision of the Court of Common Pleas was cited in *McLeod v. Insurance Co. of N. A.* 34 N. S. 88, holding an amount claimed for the services of the master and crew while the vessel was in the hands of the underwriters could not be recovered under the sue and labor clause; *Meyer v. Ralli*, 1 C. P. Div. 358, 45 L. J. C. P. N. S. 741, 35 L. T. N. S. 838, 34 Week. Rep. 963, 3 Asp. Mar. L. Cas. 324, on what expenses recoverable under the suing and laboring clauses.

#### **— Cost of reshipping or otherwise preserving cargo.**

Cited in *Lee v. Southern Ins. Co.* L. R. 5 C. P. 397, 39 L. J. C. P. N. S. 218, 22 L. T. N. S. 443, 18 Week. Rep. 863, holding under the suing and laboring clause the assured might recover the cost of reshipping the cargo where the vessel was lost.

#### **Nature of clause "to sue and labor."**

Cited in *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, on the nature of a suing and laboring clause.

#### **Liability of marine insurer where cargo was re-shipped.**

Cited in *Pierce v. Columbian Ins. Co.* 14 Allen, 320, holding insurer of a cargo against total loss were liable under such policy where the vessel carrying the cargo was condemned for unseaworthiness and the cargo was transferred to other vessels one of which was lost.

#### **Total loss of freight by enforced reshipment.**

Cited in *Hubbell v. Great Western Ins. Co.* 74 N. Y. 246, on what necessary to constitute a total loss of freight; *Morton v. Patillo*, 9 N. S. 17, on liability of underwriter for freight where ship owner is compelled to reship cargo.

The decision of the court of Common Pleas was cited in *Driscoll v. Millville M. Ins. Co.* 23 N. B. 160, holding a ship owner might recover from the underwriters for a total loss of freight where the vessel was lost and the ship owner was compelled to ship his cargo by another vessel.

#### **Construction of statutes.**

The decision of the Court of Common Pleas was cited in *University of Michigan v. Auditor General*, 109 Mich. 134, 66 N. W. 956, on acts passed for particular purposes as not being abrogated by general legislation.

#### **Meaning of "average" or "charge" as used in insurance.**

Cited in *Western Assur. Co. v. Baden M. Assur. Co.* Rap. Jud. Quebec, 22 C. S. 374, holding it proper to take testimony as to meaning of "special charges."

#### **Insurance against "general average."**

Cited in *Spooner v. Western Assur. Co.* 38 U. C. Q. B. 62, on insurer as contracting to pay general average where policy exempts him from payment of average "unless general."

14 E. R. C. 271, *IONIDES v. UNIVERSAL MARINE ASSO.* 14 C. B. N. S. 259, 10 Jur. N. S. 18, 32 L. J. C. P. N. S. 170, 8 L. T. N. S. 705, 11 Week. Rep. 858.

**Application of doctrine of proximate cause.**

Cited in *Pacific Union Club v. Commercial Union Assur. Co.* 12 Cal. A<sub>1</sub> p. 503, 107 Pac. 728, holding that where policy insured against all direct loss by fire except as thereafter provided, and then declared that insurer should not be liable for loss caused directly or indirectly by earthquake, exception was loss by fire caused directly or indirectly by earthquake and not loss caused directly or indirectly by earthquake; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768, holding a person whose servant so negligently drives in a street as to cause another horse to run away may be held liable for damages resulting; *Toms v. Whitby*, 35 U. C. Q. B. 195, holding defendants liable for injury to plaintiff's wife where a horse while crossing bridge took fright and because of want of guard rails backed off of the bridge; *The Titania*, 19 Fed. 101; *Richelieu & O. Nav. Co. v. Boston M. Ins. Co.* 26 Fed. 596; *Thistle v. Union Forwarding & R. Co.* 29 U. C. C. P. 76; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422, 6 Am. Rep. 115,—on the doctrine of proximate cause.

Cited in *Hughes Adm.* 75, on proximate cause of loss in case of marine insurance.

**— Insured causes and risks.**

Cited in *New York & B. Despatch Exp. Co. v. Traders' & M. Ins. Co.* 132 Mass. 377, holding a recovery could be had for goods insured against "immediate loss by fire" where vessel came into collision with another and fire broke out and the vessel sank before fire reached goods but where the goods would have been saved had not the fire interfered; *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 20 L.R.A. 297, 35 Am. St. Rep. 540, 33 N. E. 690, holding a recovery might be had for the loss of building and machinery insured against fire where the fire caused a "short circuit," which resulted in damage to machinery not reached by the fire; *Brown v. St. Nicholas Ins. Co.* 61 N. Y. 332, holding defendant company liable under a policy which provided that if the boat was prevented by ice or the closing of navigation from terminating the trip, the policy should cease where a storm stranded the vessel and it was shut in by ice and finally sunk; *Foster v. Fidelity F. Ins. Co.* 24 Pa. Super. Ct. 585, holding no recovery could be had under a fire insurance policy where a building was damaged by a fire engine colliding with it while on the way to the fire; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159, holding a defendant liable for indemnity where, while the injury would not have happened but for plaintiff's negligence, the defendant might by the exercise of ordinary care have prevented it; *McPherson v. Guardian Ins. Co. N. F.* (1884-96) 768, holding that any loss resulting from effort to put out fire, whether by spoiling goods or otherwise directly or indirectly, is within fire insurance policy; *Musgrave v. Mannheim Ins. Co.* 32 N. S. 405, holding that owner of vessel may recover amount of freight to be earned from insurance company where risk covered such item and voyage was rendered impossible by perils of sea.

Cited in note in 24 E. R. C. 397, on exemption from liability due to dangers and accidents of the sea.

Notes on E. R. C.—86.

14 E. R. C. 296, LAWRENCE v. ABERDEIN, 5 Barn. & Ald. 107, 24 Revised Rep. 299.

**Liability under policy of marine insurance on property of inherently risky nature.**

Cited in Perry v. Cobb, 88 Me. 435, 49 L.R.A. 389, 34 Atl. 278, holding no liability under a policy insuring against the perils of the sea where the damage to the cargo resulted from its own inherent qualities excited by the long-protracted voyage; Musgrave v. Mannheim Ins. Co. 32 N. S. 405, holding a recovery might be had for an amount insured upon freight where the vessel broke its shaft and the cargo was returned to the shippers because the vessel could not be repaired in time to carry the cargo without material deterioration of it; Taylor v. Dunbar, L. R. 4 C. P. 206, 38 L. J. C. P. N. S. 178, 17 Week. Rep. 382, holding there could be no recovery as for a loss by perils of the sea, where the vessel being delayed by bad weather, her cargo of meat because of such delay became putrid.

Cited in note in 44 L.R.A.(N.S.) 578, on animal insurance.

Cited in 4 Elliott Railr. 2d ed. 300, on nonliability of carrier for injuries to live stock arising from inherent nature of stock; Porter Bills of L. 161, on nonliability of carrier where consignee is not ready to receive live stock.

**Construction of excepted causes of risk or loss.**

Cited in Greene v. Pacific Mut. Ins. Co. 9 Allen, 217, holding a warranty by the insured that the vessel shall be free from seizure, capture or detention, did not prevent the insured from recovering under a policy insuring against a total loss only where the vessel was taken possession of by mutineers.

Cited in note in 14 Eng. Rul. Cas. 43, on construing general terms in policy to include acts and events incidental to adventure.

**Description of animals in policy of marine insurance.**

Cited in Wolcott v. Eagle Ins. Co. 4 Pick. 429, holding live animals and freight thereon were not included within the terms of a policy, upon "freight and cargo."

**Proximate cause.**

Cited in Tilton v. Hamilton F. Ins. Co. 1 Bosw. 367 (dissenting opinion), on the doctrine of proximate cause; Evans v. Fitchburg R. Co. 111 Mass. 142, 15 Am. Rep. 19, holding defendant railroad company was not liable for injury to one horse caused by another horse where the owner thereof in shipping did not remove their shoes and improperly tied them.

**What constitutes total loss of animals within marine insurance policy.**

Cited in Brooke v. Louisiana State Ins. Co. 4 Mart. N. S. 640, holding that the loss of half or more of a cargo of mules was a total loss within terms of policy insuring against total loss.

14 E. R. C. 305, DE VAUX v. SALVADOR, 4 Ad. & El. 420, 1 H. & W. 751, 5 L. J. K. B. N. S. 134, 6 Nev. & M. 713.

**Perils of the sea.**

Cited in Peters v. Warren Ins. Co. 3 Sumn. 389, Fed. Cas. No. 11,035; Sherwood v. General Mut. L. Ins. Co. 1 Blatchf. 251, Fed. Cas. No. 12,776,—holding that policy of insurance against perils of sea comprehends damages paid by insured vessel to another, in consequence of collision; Jordan v. Great Western Ins. Co. 24 N. B. 421, holding a recovery might be had on a contract of insurance of freight, against the perils of the sea where the vessel ran into floating ice

and was frozen in so as to be unable to continue the voyage; *Ionides v. Universal Marine Asso.* 14 E. R. C. 271, 32 L. J. C. P. N. S. 170, 14 C. B. N. S. 259, 10 Jur. N. S. 18, 8 L. T. N. S. 705, 11 Week. Rep. 858, holding there could be a recovery of the loss of a cargo as by the perils of the sea where the vessel went ashore because of the absence of the beacon light which had been removed by the act of hostile troops.

Cited in note in 14 Eng. Rul. Cas. 292, on perils of the sea.

Cited in *Hughes, Adm.* 72, on meaning of perils of the sea.

#### **Liability for loss by collision of insured vessel.**

Cited in *Mathews v. Howard Ins. Co.* 11 N. Y. 9, holding loss from negligent collision not covered by policy; *General Mut. Ins. Co. v. Sherwood*, 14 Illow. 351, 14 L. ed. 452 (reversing 1 Blatchf. 25, Fed. Cas. No. 12,776); *The Barnstable*, 181 U. S. 464, 45 L. ed. 954, 21 Sup. Ct. Rep. 684; *Street v. Augusta Ins. & Bkg. Co.* 12 Rich. L. 13, 75 Am. Dec. 714,—holding underwriters were not liable for damages plaintiff had to pay where his vessel damaged another vessel in a collision due to the negligence of his master and crew; *Xenos v. Wickham*, 13 E. R. C. 422, 36 L. J. C. P. N. S. 313, 14 C. B. N. S. 452, L. R. 2 H. L. 296, 16 L. T. N. S. 800, 16 Week. Rep. 38, on effect of omission of "running down clause;" *The North Britain* [1894] P. 77, 63 L. J. Prob. N. S. 33; *London S. S. Owners' Ins. Co. v. Grampian S. S. Co.* 61 L. T. N. S. 774, L. R. 24 Q. B. Div. 32, 663, 59 L. J. Q. B. N. S. 549, 62 L. T. N. S. 784, 38 Week. Rep. 651, 6 Asp. Mar. L. Cas. 506, on underwriter as not being liable for loss caused by having to pay damages for collision caused by plaintiffs' negligence; *Inman S. S. Co. v. Bischoff*, L. R. 7 App. Cas. 670, 52 L. J. Q. B. N. S. 169, 47 L. T. N. S. 581, 31 Week. Rep. 141, 5 Asp. Mar. L. Cas. 6, on the award of damages against a ship for a collision occasioning damages to another ship as not being a loss of the ship.

Distinguished in *Nelson v. Suffolk Ins. Co.* 8 Cush. 477, 54 Am. Dec. 770, holding under a policy insuring against the perils of the sea, the insurer was liable for damage caused by plaintiffs' vessel to another vessel in a collision caused by the negligence of master and crew of plaintiffs' vessel.

Disapproved in *Peters v. Warren Ins. Co.* 14 Pet. 99, 14 L. ed. 371 (affirming 3 Sumn. 389, Fed. Cas. No. 11,035) holding underwriters were liable to ship damaged in an accidental collision for damages apportioned as her share towards the common loss.

#### **Liability of insurer as to wages and provisions during repairs or in salvage.**

Cited in *Giles v. Eagle Ins. Co.* 2 Met. 140, holding the labor of the master and crew in getting off the vessel was not general average so as to render underwriters liable for; *May v. Delaware Ins. Co.* 19 Pa. 312, holding the wages of master and crew during the period spent in raising the vessel are not the subject of general average.

#### **— For costs attendant on loss.**

Cited in *Field S. S. Co. v. Burr* [1898] 1 Q. B. 821, 67 L. J. Q. B. N. S. 528, 78 L. T. N. S. 293, 46 Week. Rep. 490, 8 Asp. Mar. L. Cas. 384, 14 Times L. R. 310, affirmed in [1899] 1 Q. B. 579, 68 L. J. Q. B. N. S. 426, 47 Week. Rep. 341, 80 L. T. N. S. 445, 15 Times L. R. 193, 4 Com. Cas. 106, 8 Asp. Mar. L. Cas. 529, holding the underwriters were not rendered liable for the cost of disposing of cargo rendered worthless by perils of sea.

#### **General average losses.**

Cited in *Hathaway v. Sun Mut. Ins. Co.* 8 Bosw. 33, on what items chargeable

in particular and general average; *Steinhoff v. Royal Canadian Ins. Co.* 42 U. C. Q. B. 307, holding plaintiffs might recover for the loss of a deck load custom allowing such loading and dealing with it as a subject of general average.

#### **Proximate causes of loss in insurance.**

Cited in *Brady v. North Western Ins. Co.* 11 Mich. 425 (dissenting opinion), on necessity that in order to render underwriters liable for a loss, the loss be the proximate consequences of the risk undertaken.

#### **Contributory negligence in admiralty.**

Cited in *The Max Morris*, 28 Fed. 881, holding in a suit in admiralty for personal injuries contributory negligence of the libellant is not a bar to his recovery.

#### **Division of damages for collision.**

Cited in *The Rival*, 1 Sprague, 128, Fed. Cas. No. 11,867; *The Catharine v. Dickinson*, 17 How. 170, 15 L. ed. 233; *Stoomvaart, Maatschappy Nederland v. Peninsular & O. Nav. Co.* L. R. 7 App. Cas. 795, 52 L. J. Prob. N. S. 1, 47 L. T. N. S. 198, 31 Week. Rep. 249, 5 Asp. Mar. L. Cas. 360, 567; *The Burke*, 4 Cliff. 582, Fed. Cas. No. 2,159,—holding in an action for damages caused by a collision both vessels being at fault the damages would be divided; *The Atlas*, 4 Ben. 27, Fed. Cas. No. 633; *Waring v. Clarke*, 5 How. 441, 12 L. ed. 226 (dissenting opinion); *The Atlas (Phoenix Ins. Co. v. The Atlas)* 93 U. S. 302, 23 L. ed. 863,—on the rule of damages in admiralty where concurring negligence causes a collision of vessels.

14 E. R. C. 319, *BELL v. CARSTAIRS*, 2 Campb. 543, 11 Revised Rep. 793, 14 East, 374, 12 Revised Rep. 557.

#### **Insurability of vessel not properly documented.**

Distinguished in *Walsh v. Washington Marine Ins. Co.* 3 Robt. 202, holding the failure of a vessel to carry a ship's carpenter did not render the vessel unseaworthy.

#### **Necessity of showing national character of vessel in insurance thereof.**

Cited in *Polleys v. Ocean Ins. Co.* 14 Me. 141, holding where the national character of a vessel is not made a part of the contract of insurance the want of the proper documents to show such character is not material.

Cited in note in 14 Eng. Rul. Cas. 170, on express warranty of neutral or national character of ship.

#### **Non-compliance with statutes as affecting validity of insurance.**

Cited in *Warren v. Manufacturers Ins. Co.* 13 Pick. 518, 25 Am. Dec. 341, holding a failure of insured to comply with requirements of statute did not of itself render the voyage illegal so as to avoid the policy of insurance thereon; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 43 L. J. Q. B. N. S. 220, 31 L. T. N. S. 31, 22 Week. Rep. 914, holding the failure of the master of a vessel to obtain a certificate that the ship is fit to carry passengers as required by law does not render the voyage illegal so as to avoid a policy of insurance.

#### **Risks covered by policy of marine insurance.**

Cited in *Maryland & P. Ins. Co. v. Bathurst*, 5 Gill & J. 159, on risks covered by policy of marine insurance general in nature.

#### **— Losses due to neglect or fault of vessel.**

Cited in *American Ins. Co. v. Ogden*, 20 Wend. 287, holding an insurer was not liable for a total loss where the necessity for an abandonment was the result of culpable negligence on the part of the owner; *Standard M. Ins. Co.*

v. Nome Beach Lighterage & Transp. Co. 1 L.R.A.(N.S.) 1095, 67 C. C. A. 602, 133 Fed. 636; Williams v. New England Ins. Co. 3 Cliff. 244, Fed. Cas. No. 17,731; Tilton v. Hamilton F. Ins. Co. 1 Bosw. 367 (dissenting opinion), on assurers as not being liable where loss caused by wrongful act of assured.

Cited in note in 1 L.R.A.(N.S.) 1097, on effect of voluntary exposure to peril upon liability on marine policy.

Distinguished in Trinder, A. & Co. v. Thames & M. M. Ins. Co. [1898] 2 Q. B. 114, 67 L. J. Q. B. N. S. 666, 78 L. T. N. S. 485, 46 Week. Rep. 561, 8 Asp. Mar. L. Cas. 373, 3 Com. Cas. 123, 14 Times L. R. 386, holding it was no defense in an action on a policy of insurance that the loss arose through the negligent navigation of the master not amounting to wilful negligence.

#### **Representations made to one insurer as evidence for another insurer.**

Cited in Grant v. Aetna Ins. Co. C. R. 4 A. C. 490, reversing 11 Lower Can. Rep. (Dec. Des Tribunaux) 128, holding contemporaneous representations made by an assured to other insurers of the same subject may be proved by defendant company.

14 E. R. C. 332, BUSK v. ROYAL EXCH. ASSUR. CO. 2 Barn. & Ald. 73, 20 Revised Rep. 350.

#### **Negligence or act of insured as affecting liability of insurer.**

Cited in Gove v. Farmers' Mut. F. Ins. Co. 48 N. H. 41, 2 Am. Rep. 168, 97 Am. Dec. 572, holding insurers were liable where buildings were destroyed by fire set by an insane wife while in the custody of husband; Gates v. Madison County Mut. Ins. Co. 5 N. Y. 469, 55 Am. Be. 360, holding defendant company liable where property destroyed by fire which was due to the negligence of plaintiff's tenant; Perrin v. Protection Ins. Co. 11 Ohio, 147, 38 Am. Dec. 728, holding negligence of the agent of the plaintiff no defence in an action on a policy of fire insurance; Hume & Co. v. Providence Washington Ins. Co. 23 S. C. 180; Andrews v. Essex F. & M. Ins. Co. 3 Mason, 6, Fed. Cas. No. 374; Natchez Ins. Co. v. Stanton, 2 Smedes & M. 340, 41 Am. Dec. 592,—on insurer as being liable for loss where proximate cause thereof is attributable to enumerated risks, though the remote cause attributable to the insured; McDowell v. General Mut. Ins. Co. 7 La. Ann. 684, 56 Am. Dec. 619; Parkhurst v. Gloucester Mut. Fishing Ins. Co. 100 Mass. 301; Taylor v. Sechrist, 2 Disney (Ohio) 299; Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35, 35 Am. Rep. 589; Street v. Augusta Ins. & Bkg. Co. 12 Rich. L. 13, 75 Am. Rep. 714; Morgan v. United States, 5 Ct. Cl. 182; Columbia Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. ed. 512; Levi v. New Orleans Mut. Ins. Asso. 2 Woods, 63, Fed. Cas. No. 8,290; Potter v. Suffolk Ins. Co. 2 Sumn. 197, Fed. Cas. No. 11,339; Dixon v. Sadler, 14 E. R. C. 58, 5 Mees. & W. 405, 9 L. J. Exch. N. S. 48; Holdom v. Ancient Order U. W. 159 Ill. 619, 31 L.R.A. 67, 50 Am. St. Rep. 183, 43 N. E. 772,—on negligence of insured as not relieving insured from liability for loss from the cause of risk insured against; Johnston v. Dominion Grange Mut. F. Ins. Co. 23 Ont. App. Rep. 729, on negligence as ordinarily being one of the risks insured against; Karow v. Continental Ins. Co. 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27, holding defendant company was not relieved from liability where the property was burned by the assured while insane; Wadsworth v. Canadian R. Acci. Ins. Co. 3 D. L. R. 668, 26 Ont. L. Rep. 55, Ann. Cas. 1913A, 546, holding that where an epileptic fit leaves man unconscious and while in that condition he is so severely burned that death results, proximate cause of death is fire.

Cited in notes in 14 Eng. Rul. Cas. 293, and 14 Eng. Rul. Cas. 344, on liability of insurer for loss of vessel by fire due to negligence.

**— Barratrous negligence.**

Cited in Richelieu & O. Nav. Co. v. Boston M. Ins. Co. 26 Fed. 596, on negligence not amount to barratry as not relieving insurer from liability.

Disapproved in Fulton v. Lancaster Ohio Ins. Co. 7 Ohio pt. 2, p. 5, holding a policy of river insurance containing no clause against barratry does not cover a loss where the remote cause was the negligence of the crew.

**— In sea insurance.**

Cited in Georgia Ins. & T. Co. v. Dawson, 2 Gill. 365, holding insurers liable where damage by sea water caused by perils of the sea although the cargo was not properly stowed; Waters v. Merchants' Louisville Ins. Co. 11 Pet. 213, 9 L. ed. 691 (reversing 1 McLean, 275, Fed. Cas. No. 17,266); Trinder, A. & Co. v. Thames & M. M. Ins. Co. [1898] 2 Q. B. 114, 67 L. J. Q. B. N. S. 666, 78 L. T. N. S. 485, 8 Asp. Mar. L. Cas. 373, 3 Com. Cas. 123, 14 Times L. R. 386, 46 Week. Rep. 561; Sherlock v. Globe Ins. Co. 1 Cin. Sup. Ct. Rep. 193,—holding negligence on the part of the officers of an insured vessel will not relieve the insurer from liability; Hutchins v. Ford, 82 Me. 363, 19 Atl. 832; Sherwood v. General Mut. L. Ins. Co. 1 Blatchf. 251, Fed. Cas. No. 12,776; Hale v. Washington Ins. Co. 2 Story, 176, Fed. Cas. No. 5,916,—holding insurers were liable for an amount paid by plaintiff for damage resulting to a vessel in a collision caused by negligence of plaintiff's servants in the management of his vessel.

Distinguished in Mathews v. Howard Ins. Co. 11 N. Y. 9 (reversing 13 Barb. 234), holding insurers were not liable to pay the loss occasioned to plaintiffs who had to pay for the injury to a vessel in a collision with their vessel through the negligence of crew in charge of plaintiffs' vessel.

**Validity of insurance against barratry.**

Cited in Joy v. Allen, 2 Woodb. & M. 303, Fed. Cas. No. 7,552, on existence of right to insure against barratry.

**Adequate manning as part of seaworthiness.**

Cited in Lewis v. Aetna Ins. Co. 123 Fed. 157, holding a temporary absence of master of a vessel was not such unseaworthiness as to relieve insurer from liability; Caldwell v. Western M. & F. Ins. Co. 19 La. 42, 36 Am. Dec. 667, on a competent crew as being essential to the seaworthiness of an insured vessel.

**— Incompetence of officers or crew or other deficiency arising en voyage.**

Cited in Nelson v. Suffolk Ins. Co. 8 Cush. 477, 54 Am. Dec. 770, holding it settled that insurer is liable if ship, master, officers, crew and equipment were competent and sufficient at beginning of voyage; Copeland v. New England M. Ins. Co. 2 Met. 432, holding an insured vessel provided with a competent crew and master at the home port does not become unseaworthy by reason that the master becomes incompetent at a home port; Kenny v. Halifax M. Ins. Co. 1 N. S. 141, holding the failure of the master to replace an anchor lost after the commencement of the voyage did not render the vessel unseaworthy.

**Barratry defined.**

Cited in Atkinson v. Great Western Ins. Co. 65 N. Y. 531, on the meaning of the term "barratry;" Patapseo Ins. Co. v. Coulter, 3 Pet. 222, 7 L. ed. 659, on what may constitute barratry.

Cited in notes in 14 Eng. Rul. Cas. 357, and 28 L. ed. U. S. 810, on what is barratry.

**Construction of contract of insurance.**

Cited in Gillespie v. British America F. & Life Assur. Co. 7 A. C. Q. B. 108, on the construction of contract of insurance.

**Liability of vessel for negligence of crew or master.**

Cited in Harnden v. Proctor, 9 U. C. Q. B. 592, on evidence of negligence necessary to render ship owner liable for loss of cargo.

**Duty as to fires on vessel.**

Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465, on duty required of master with respect to lights and fires on vessel.

**Perils of the sea.**

Cited in Mathews v. Howard Ins. Co. 13 Barb. 234, holding that collision is peril insured against, by policy, under general terms perils of sea or perils of lake.

14 E. R. C. 345, EARLE v. ROWCROFT, 8 East, 126, 9 Revised Rep. 385.

**Marine barratry, what constitutes.**

Cited in Patapsco Ins. Co. v. Coulter, 3 Pet. 222, 7 L. ed. 659, to the point that if deviation was fraudulent, it must be deemed barratry and a risk under policy; Lawton v. Sun Mut. Ins. Co. 2 Cush. 500, holding the act of the master in fraudulently selling part of the ship's tackle constituted barratry where it tended to defeat the purpose of the voyage; Atkinson v. Great Western Ins. Co. 4 Daly, 1, to the point that if master sail out of port without paying port duties, whereby goods are forfeited, that is barratry; Cook v. Commercial Ins. Co. 11 Johns. 40, 6 Am. Dec. 353, holding the act of a master in converting a cargo to his own use and absconding constituted barratry; Cory v. Burr, L. R. 8 App. Cas. 393, 52 L. J. Q. B. N. S. 657, 49 L. T. N. S. 78, 31 Week. Rep. 894, 5 Asp. Mar. L. Cas. 109, holding the act of a master in smuggling whereby the vessel was seized by revenue officers was barratrous; Grill v. General Iron Screw Colliery Co. 4 E. R. C. 680, L. R. 1 C. P. 600, 35 L. J. C. P. N. S. 321, 12 Jur. N. S. 727, 14 Week. Rep. 893, 14 L. T. N. S. 711, holding the act of a vessel in starboording her helm in contravention of the rules of the shipping act was not barratrous; Richardson v. Maine F. & M. Ins. Co. 6 Mass. 102, 4 Am. Dec. 92; American Ins. Co. v. Bryan, 26 Wend. 563, 37 Am. Dec. 278; Walden v. New York Firemen Ins. Co. 12 Johns. 128; Atkinson v. Great Western Ins. Co. 65 N. Y. 531 (reversing 4 Daly 1); The Bermuda, 6 Phila. 187, 23 Phila. Leg. Int. 116, Fed. Cas. No. 1,345; Joy v. Allen, 2 Woodb. & M. 303, Fed. Cas. No. 7,552; Wilson v. General Mut. Ins. Co. 12 Cush. 360, 59 Am. Dec. 188,—on what may constitute barratry; Grim v. Phoenix Ins. Co. 13 Johns. 451, on necessity that act to be barratrous be done with fraudulent intent; Crowell v. Geddes, 5 N. S. 184, on when a deviation from the voyage will amount to barratry.

Cited in note in 28 L. ed. U. S. 809, 810, on what is barratry.

Cited in Porter, Bills of L. 146, on what acts are barratrous; Porter, Bills of L. 148, on necessity that barratrous act be prejudicial to owner.

**— Acts done with good motive or to save vessel.**

Cited in Brown v. New London U. Ins. Co. 5 Day, 1, 5 Am. Dec. 123, holding resistance by the master and mariners of a neutral vessel to the search of a belligerent is barratry; Moses v. Sun Mut. Ins. Co. 1 Duer, 159, holding the act of a master in using part of the cargo to provide provisions for the passengers where it was necessary did not constitute barratry; Wolff v. Merchants' Ins.

Co. 31 N. B. 577, holding a refusal of a master of an offer to save a vessel if he would leave it where the chances of saving were doubtful does not constitute barratry.

**Right to insure against barratry.**

Cited in Parkhurst v. Gloucester Mut. Fishing Ins. Co. 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105; Tate v. Protection Ins. Co. 20 Conn. 481, 52 Am. Dec. 350,—on the right to insure against barratry.

**Marine insurance, negligence as affecting right to recover.**

Cited in Sturm v. Atlantic Mut. Ins. Co. 63 N. Y. 77, holding negligence on the part of the master of a ship will not prevent a charterer from recovering insurance on the cargo.

**Negligence of master and vessel owner.**

Cited in West Port Coal Co. v. McPhail [1898] 2 Q. B. 130, 67 L. J. Q. B. N. S. 674, 78 L. T. N. S. 490, 46 Week. Rep. 566, 8 Asp. Mar. L. Cas. 378, 3 Com. Cas. 140, 14 Times L. R. 388, holding the negligence of the defendant who was master and also part owner was that of the master exclusively.

14 E. R. C. 359, KOSTER v. REED, 6 Barn. & C. 19, 9 Dowl. & R. 2, 30 Revised Rep. 239.

14 E. R. C. 363, TAYLOR v. CURTIS, 4 Campb. 337, Holt, 192, 2 Marsh, 309, 16 Revised Rep. 686, 6 Taunt. 608.

**General average.**

Cited in The Bona [1895] P. 125, 14 E. R. C. 376, 64 L. J. Prob. N. S. 62, 71 L. T. N. S. 870, 43 Week. Rep. 290, 11 Reports, 707, 7 Asp. Mar. L. Cas. 557, (opinion of lower court) on what may be made the subject of general average.

**— Expenses as subject of average.**

Cited in Emery v. Huntington, 109 Mass. 431, 12 Am. Rep. 725, holding the expenses of repairs rendered necessary by reason of a collision with another vessel without fault of the former was not the subject of general average; Chaffey v. Schooley, 40 U. C. Q. B. 165, holding expenses of keeping a vessel afloat were not the subject of general average where the vessel was unseaworthy at the commencement of the voyage.

14 E. R. C. 376, THE BONA, 7 Asp. Mar. L. Cas. 557, 64 L. J. Prob. N. S. 62, 71 L. T. N. S. 870 [1895] p. 125, 11 Reports, 707, 43 Week. Rep. 289.

**General average for expenses.**

Cited in International Nav. Co. v. Atlantic Mut. Ins. Co. 100 Fed. 304, on expenses incurred in the saving of a ship as being the subject of general average.

14 E. R. C. 386, ATWOOD v. SELLAR, 4 Asp. Mar. L. Cas. 233, 49 L. J. Q. B. N. S. 515, 42 L. T. N. S. 644, L. R. 5 Q. B. Div. 286, 28 Week. Rep. 604, affirming the decision of the Queen's Bench Division, reported in L. R. 4 Q. B. Div. 342.

**What constitutes general average loss.**

Cited in The Queen, 28 Fed. 755, holding that repairs made necessary by general average clause are subject of general average affecting cargo so far as repairs are necessary to enable ship to prosecute voyage; The L'Amerique, 35 Fed. 835, holding that where cargo has been safely unloaded and warehoused, subse-

quent expenses, such as incurred in floating ship, are not general average charges; *Svendsen v. Wallace*, 24 E. R. C. 445, L. R. 10 App. Cas. 404, 5 Asp. Mar. L. Cas. 453, 54 L. J. Q. B. N. S. 497, 52 L. T. N. S. 901, 34 Week. Rep. 369, holding the expenses of reshipping cargo where the vessel put into harbor for repairs was not the subject of general average.

Cited in notes in 14 E. R. C. 408, on goods laden on deck thrown overboard to preserve vessel and remaining cargo as general average loss; 14 E. R. C. 381, on what constitutes a general average loss.

The decision of the court of Queen's Bench was cited in *Kidd v. Thomson*, 26 Ont. App. Rep. 220, holding that liability to general average contribution arises only where both ship and cargo are in imminent peril and there is expenditure to secure their safety.

**Right of master to store cargo during repairs to ship and then complete voyage.**

The decision of the court of Queen's Bench was cited in *The Strathdon*, 89 Fed. 374, on right of master of vessel when it becomes unfit for navigation from a cause which does not involve a breach of duty, and it becomes necessary to stop for repairs to retain or store the cargo until completion of repairs and then carry it to port of delivery, earning his freight.

14 E. R. C. 400, *GOULD v. OLIVER*, 4 Bing. N. C. 134, 3 Hedges, 307, 7 L. J. C. P. N. S. 68, 5 Scott, 445, the decision of the Court of Common Pleas on a motion for a new trial after trial on the merits is reported in 2 Scott, N. R. 241.

**General average in favor of deck loads.**

Cited in *Lawrence v. Minturn*, 17 How. 100, 15 L. ed. 58, holding that owner of goods on deck has no claim in case of jettison as against master or owner of ship; *Goddefroy v. The Live Yankee*, Hoffm. Aps. 433, Fed. Cas. No. 5,496, holding that where goods were carried on deck by special agreement and at lower rate, owner cannot have contribution for loss by jettison; *Wood v. Phoenix Ins. Co.* 1 Fed. 235, holding that general rule is that goods carried on deck are not entitled to benefit of general average; *The May & Eva*, 6 Fed. 628, holding where a deck load is jettisoned for the common benefit the owners are entitled to a general average contribution for the loss, though an agreement that cargo be carried on deck; *The Watchful*, Brown, Adm. 469, Fed. Cas. No. 17,250, holding vessel liable to contribute by general average for loss of deck load by jettison, where load was carried on deck by agreement; *The William Gillum*, 2 Low. Dec. 154, Fed. Cas. No. 17,693, holding ship and freight liable for contribution by general average where a deck load is jettisoned which by usage it was permissible to carry on deck; *Harris v. Moody*, 30 N. Y. 266, 86 Am. Dec. 375 (affirming 4 Bosw. 210), holding goods carried on deck are liable for contribution by way of general average for a loss occasioned by jettison of other goods necessarily thrown overboard; *Milward v. Hibbert*, 24 E. R. C. 473, 2 Gale & D. 142, 6 Jur. 706, 11 L. J. Q. B. N. S. 137, 3 Q. B. 120; *Cameron v. Domville*, 17 N. B. 647; *Marks v. Watson*, 4 N. B. 211, holding where goods are laden on deck according to a custom the owner thereof is entitled to contribution in general average for a loss by jettison; *The John H. Cannon*, 51 Fed. 46; *Wood v. The Sallie C. Morton*, Fed. Cas. No. 17,962; *Johnston v. Crane*, 3 N. B. 358; *Spooner v. Western Assur. Co.* 38 U. C. Q. B. 62; *Wood v. Phenix Ins. Co.* 14 Phila. 545, 37 Phila. Leg. Int. 448, 10 W. N. C. 277,—on when goods carried on deck may be the subject of general average; *Gibb v. McDonell*, 7 U. C. Q. B. 356, on liability of owners of

goods stowed below, to average, upon loss of goods laden on deck: *Paterson v. Black*, 5 U. C. Q. B. 481, holding that whether ship will be liable in case of loss of goods loaded on deck, depends on usage prevailing in respect to deck loading in particular navigation.

#### **Rights as to goods on deck.**

Cited in *Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108, as recognizing the law that goods on deck are not to be treated as goods under deck; *The Delaware* (*The Delaware v. Oregon Iron Co.*) 14 Wall. 579, 20 L. ed. 779, on usage as sanctioning stowage of goods on deck.

Cited in *2 Hutchinson*, Car. 3d ed. 674, on usage as affecting right to stow goods on deck in particular instances.

#### **— Marine insurance of.**

Cited in *Merchants & Mfg. Ins. Co. v. Shillito*, 15 Ohio St. 559, 86 Am. Dec. 491, holding where goods specified in the policy are by general usage carried on deck, on their being jettisoned on the voyage the underwriter is liable therefor.

#### **Nonrecovery for injury to property where owner is at fault.**

Cited in *Dix v. Brown*, 41 Miss. 131, holding a party could not recover for the wrongful act of another if by the exercise of reasonable diligence he might have avoided the damage; *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404; *Adamson v. McNab*, 6 U. C. Q. B. 113; *Hilton v. Fonda*, 86 N. Y. 339,—on right to recover for an injury to property where owner is at fault.

The later decision of the Court of Common Pleas was cited in *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721 (dissenting opinion); *Stauber v. McEntee*, 29 Jones & S. 338, 19 N. Y. Supp. 900; *Macon & W. R. Co. v. Davis*, 13 Ga. 68, on nonrecovery for damage for an injury to property which is occasioned by the owner's negligence.

#### **Vacation hearings.**

The later decision of the Court of Common Pleas was cited in *Doggett v. Emerson*, 1 Woodb. & M. 1, Fed. Cas. No. 3,961; *Walker v. Rogan*, 1 Wis. 597,—on validity of a hearing in vacation by consent of all parties.

#### **Judicial admissions or statements.**

The later decision of the Court of Common Pleas was cited in *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41, on statements made for the purpose of presenting an issue as not being evidence upon any other issue in the same record.

#### **Usage as varying contract.**

Cited in *Bowen v. Newell*, 2 Duer, 584, on effect of usage to vary that which otherwise would have been deemed the legal construction of a contract.

14 E. R. C. 409, *ANDERSON v. OCEAN S. S. CO.* L. R. 10 App. Cas. 107, 54

L. J. Q. B. N. S. 192, 52 L. T. N. S. 441, 33 Week. Rep. 433, reversing the decision of the Court of Appeal, reported in L. R. 13 Q. B. Div. 651, 32 Week. Rep. 472.

#### **General average—liability.**

Cited in *The Roanoke*, 46 Fed. 297, holding damage by water poured upon cargo to extinguish fire is the subject of general average; *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 304, on what may be the subject of general average; *Marwick v. Rogers*, 163 Mass. 50, 47 Am. St. Rep. 436, 39 N. E. 780, on the liability to contribute to a general average being a legal but not contractual obligation enforceable by lien.

Cited in note in 14 Eng. Rul. Cas. 407, on goods laden on deck thrown overboard to preserve vessel and remaining cargo as general average loss.

The decision of the Court of Appeal was cited in Kidd v. Thomson, 26 Ont. App. Rep. 220, holding that liability to general average contribution arises only when both ship and cargo are in imminent danger and there is expenditure to secure their safety.

**— Salvage expenses between ship and cargo.**

Cited in The Jason, 162 Fed. 56, holding a vessel was not entitled to recover a contribution in general average from the cargo for salvage expenses where the vessel was negligently stranded; Western Assur. Co. v. Ontario Coal Co. 19 Ont. App. Rep. 41; Western Assur. Co. v. Ontario Coal Co. 19 Ont. Rep. 462,—holding cargo not liable to contribution in general average for salvage expenses where at time incurred the cargo was not in danger.

**— For salvage by agreement of master.**

Cited in The Prinz Heinrich, L. R. 13 Prob. Div. 31, 57 L. J. Prob. N. S. 17, 58 L. T. N. S. 593, 36 Week. Rep. 511, 6 Asp. Mar. L. Cas. 273, holding where an agreement was for a particular sum for salvage, the shipowners were liable for such sum without any deduction in respect to the salvage of the cargo.

Distinguished in The Raisby, L. R. 10 Prob. Div. 114, 54 L. J. Prob. N. S. 65, 53 L. T. N. S. 56, 33 Week. Rep. 938, 5 Asp. Mar. L. Cas. 473, holding there was no necessary liability of cargo to contribute to ship salvage.

**Measure of compensation for salvage.**

The decision of the Court of Appeal was cited in The Roanoke, 50 Fed. 574, holding that where contract is to pay fixed price for salvage, service remains salvage service, but measure of compensation is fixed by contract and not by value of property saved.

14 E. R. C. 422, SIMONDS v. WHITE, 2 Barn. & C. 805, 4 Dowl. & R. 375, 2 L. J. K. B. N. S. 159, 26 Revised Rep. 560.

**Peace and law governing average adjustment.**

Cited in McGivern v. Stymest, 10 N. B. 320, holding the law of general average in force at the place of discharge governs in the adjustment of the loss; Doane v. Keating, 12 Leigh, 391, 37 Am. Dec. 671; Hobson v. Lord, 92 U. S. 397, 23 L. ed. 613; Monsen v. Amsinck, 166 Fed. 817; Wood v. The Sallie C. Morton, Fed. Cas. No. 17,962; Gibb v. M'Donell, 7 U. C. Q. B. 356,—on same point.

**Conclusiveness of average adjustments.**

Cited in Peters v. Warren Ins. Co. 1 Story, 463, Fed. Cas. No. 11,034, holding that items included and sums apportioned and paid according to law of foreign country, as general average, in adjustment thereof, made there, are conclusive here; Avon Marine Ins. Co. v. Barteaux, 8 N. S. 195, holding that underwriter is bound to reimburse all such general average charges as have been assessed on assured by foreign adjustment.

Explained in Wavertree Sailing Ship Co. v. Love [1897] A. C. 373, 66 L. J. P. C. N. S. 77, 76 L. T. N. S. 576, 8 Asp. Mar. L. Cas. 276, on the conclusiveness of the adjustment of general average losses.

**— Adjustments at port of discharge.**

Cited in Peters v. Warren Ins. Co. 3 Sumn. 389, Fed. Cas. No. 11,035; Moran v. Taylor, 24 N. B. 39; Lloyd v. Guibert, 5 E. R. C. 870, L. R. 1 Q. B. 115, 35 L. J. Q. B. N. S. 74, 13 L. T. N. S. 602, 6 Best & S. 100; Loring v. Neptune

Ins. Co. 20 Pick. 411,—on general average loss determined at the port of destination as being conclusive on parties interested.

#### **General average—as part of maritime law and usage.**

Cited in Rossiter v. Chester, 1 Dougl. (Mich.) 154, on liability for contribution to general average being of maritime law solely and holding it not of common law cognizance; The Patria, L. R. 3 Adm. & Eccl. 436, 41 L. J. Prob. N. S. 23, 24 L. T. N. S. 849, 1 Asp. Mar. L. Cas. 71; The Brigella [1893] P. 189, 62 L. J. Prob. N. S. 81, 1 Reports, 616, 69 L. T. N. S. 834, 7 Asp. Mar. L. Cas. 337,—on liability being a purely legal customary obligation.

#### **—Implied assent of shipper.**

Cited in Atwood v. Sellar, L. R. 4 Q. B. Div. 342, 48 L. J. Q. B. N. S. 465, 41 L. T. N. S. 83; Eckford v. Wood, 5 Ala. 136—on shipper of goods as tacitly assenting to general average as a known maritime usage.

#### **Expense as general average loss.**

Cited in Hanse v. New Orleans, M. & F. Ins. Co. 10 La. 1, 29 Am. Dec. 456, holding the expenses of the crew of a vessel while it was detained at an intermediate port for repairs of injuries sustained on the voyage are subjects of general average; Svendsen v. Wallace, 24 E. R. C. 445, L. R. 10 App. Cas. 404, 5 Asp. Mar. L. Cas. 453, 54 L. J. Q. B. N. S. 497, 52 L. T. N. S. 901, 34 Week. Rep. 369, holding cargo owners not liable to contribute to general average for expenses incurred in reshipping cargo where ship was compelled to put into port.

#### **General average liens.**

Cited in Dupont de Nemours v. Vance, 19 How. 162, 15 L. ed. 584; United States v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694; Gillett v. Ellis, 11 Ill. 579,—holding the master has a lien on the cargo which he may detain until a contribution to general average is paid.

Cited in note in 70 L.R.A. 363, on what contracts will support maritime lien.

Distinguished in Huth v. Lampert, L. R. 16 Q. B. Div. 442, 54 L. T. N. S. 334, holding where a general average loss has been incurred the contribution to which cannot be immediately ascertained a ship owner cannot insist before a delivery of the cargo that the consignee should pay a deposit.

#### **Marine insurance contract as contract of indemnity.**

Cited in British & F. M. Ins. Co. v. Maldonado, 106 C. C. A. 122, 182 Fed. 744, holding that marine insurance contract, insuring contributions in general average, is contract of indemnity requiring insurer to pay full indemnity against loss, including loss on account of general average contribution.

#### **Custom or usage controlling the performance of a contract.**

Cited in The L'Amérique, 35 Fed. 835, on when custom or usage will control the performance of a contract.

14 E. R. C. 431, DICKENSON v. JARDINE, 37 L. J. C. P. N. S. 321, L. R. 3 C. P. 639, 18 L. T. N. S. 717, 16 Week. Rep. 1169.

#### **General average losses—Liability of insurer.**

Cited in De Farconnet v. Western Ins. Co. 110 Fed. 405, holding an insurer was liable under a policy against sea perils for general average charges on the cargo; Montgomery & Co. v. Indemnity Mut. M. Ins. Co. [1902] 1 K. B. 734, 71 L. J. K. B. N. S. 467, 86 L. T. N. S. 462, 50 Week. Rep. 440, 7 Com. Cas. 120, 18 Times L. R. 479, 9 Asp. Mar. L. Cas. 289, holding underwriters are liable

to contribute to a general average loss caused by the cutting away of a ship's mast for the safety of the whole adventure.

**Subrogation of underwriters to cause of action accruing to assured.**

Cited in *The Potomac* (*Potomac v. Cannon*, 105 U. S. 630, 26 L. ed. 1194), holding an underwriter by the payment of a claim to which insured was entitled had a right to be subrogated to assured's cause of action; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532, on the right of underwriters to maintain an action of tort in their own name to recover damages, the right to which accrued to assured before an abandonment; *Scaramanga v. Marquand*, 52 L. T. N. S. 764, 1 Cab. & El. 500; *Dixon v. Whitworth*, L. R. 4 C. P. Div. 371, 48 L. J. C. P. N. S. 538, 40 L. T. N. S. 718, 28 Week. Rep. 184, 4 Asp. Mar. L. Cas. 326; *National F. Ins. Co. v. McLaren*, 12 Ont. Rep. 682,—on subrogation of underwriter to rights of insured in a cause of action.

**Necessity of average adjustment before suit on insurance.**

Cited in *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 304, holding whole actual damage for salvage expenses might be directly recovered without looking to general average liability; *Stein Hoff v. Royal Canadian Ins. Co.* 42 U. C. Q. B. 307, on liability of insurer for whole loss with subrogation to general average charges; *Steamship Bahmoral Co. v. Marten* [1901] 2 K. B. 896, 70 L. J. K. B. N. S. 1018, 85 L. T. N. S. 389, 50 Week. Rep. 35, 6 Com. Cas. 298, 17 Times L. R. 765, holding salvage was recoverable only after ascertainment; *The Knight of St. Michael* [1898] P. 30, 67 L. J. Prob. N. S. 19, 78 L. T. N. S. 90, 46 Week. Rep. 396, 8 Asp. Mar. L. Cas. 360, 14 Times L. R. 191, 3 Com. Cas. 62, on subrogation of underwriter to average rights; *The Brigella* [1893] P. 189, 62 L. J. Prob. N. S. 81, 1 Reports, 616, 69 L. T. N. S. 834, 7 Asp. Mar. L. Cas. 337, on the net loss after contribution as the ultimate measure of liability of insurer.

Distinguished in *The Mary Thomas* [1894] P. 108, 63 L. J. Prob. N. S. 49, 6 Reports, 792, 71 L. T. N. S. 104, 7 Asp. Mar. L. Cas. 495, on liability of underwriter to pay loss and be subrogated to right to contribute to general average losses.

**Assignable rights in a prospective indemnity or reimbursement.**

Cited in *Leonard v. Nye*, 125 Mass. 455, holding the right of the owner of property destroyed by act of a foreign government in a sum afterwards awarded him by his own government as compensation was assignable.

14 E. R. C. 439, *USHER v. NOBLE*, 12 East, 639, 11 Revised Rep. 505.

**Computation of partial loss.**

Cited in *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513, 5 Am. Rep. 162, holding the rule of calculation to arrive at the relative amount of partial loss, to be the difference between the respective gross proceeds of the same article when sound and when damaged; *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14, holding that the market value of the goods at the port of delivery without respect to duties paid or unpaid or refunded is the standard of comparison to arrive at the proportionate loss.

**— On valued policy.**

Cited in *Natchez Ins. Co. v. Buckner*, 4 How. (Miss.) 63, holding that a valued policy cannot be opened in the case of a partial loss.

**Cost of insurance as element in value of insured property.**

Campbell v. McCaskell, 7 N. S. 36, on premium of insurance as proper part of cost of goods.

14 E. R. C. 448, AITCHISON v. LOHRE, L. R. 4 App. Cas. 755, 4 Asp. Mar. L. Cas. 168, 49 L. J. Q. B. N. S. 123, 41 L. T. N. S. 323, 28 Week. Rep. 1, reversing in part the decision of the Court of Appeal, reported in L. R. 3 Q. B. Div. 558, which reverses in part the decision of the Queen's Bench Division, reported in L. R. 2 Q. B. Div. 501.

**Sue and labor clause.**

Cited in Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, likening to the sue and labor clause, a clause requiring the assured to give notice of institution of action to enable insurer to defend the action which is to fix insurer's liability to employee.

**— Nature and effect of.**

Cited in Johnston v. Salvage Asso. L. R. 19 Q. B. Div. 458, 57 L. T. N. S. 218, 36 Week. Rep. 56, 6 Asp. Mar. L. Cas. 167, on nature and effect of the suing and laboring clause as a promise to reimburse.

Disapproved in Pride v. Providence-Washington Ins. Co. 6 Pa. Dist. R. 227, holding insurer liable for suing in defense of an insured ship under the sue and labor clause.

The decision of the Court of Appeal was cited in Dixon v. Whitworth, L. R. 4 C. P. Div. 371, 48 L. J. C. P. N. S. 538, 40 L. T. N. S. 718, 28 Week. Rep. 184, 4 Asp. Mar. L. Cas. 138, holding that the sue and labor clause will cover salvage even though there is not a total loss or abandonment, but would not cover cost of refitting.

**Expense or salvage as element of loss under marine policy.**

Cited in Buzby v. Phoenix Ins. Co. 31 Fed. 422, holding that insurers are not liable for salvage though a total loss is avoided thereby; Western Assur. Co. v. Baden M. Assur. Co. Rap. Jud. Quebec, 22 C. S. 375, distinguishing between "particular charges" which are part of loss and "particular charges" incurred under a sue and labor clause which are chargeable to insurer but not as loss.

Cited in note in 14 E. R. C. 268, 270, 271, on right to recover salvage expenses under "suing and laboring" clause in policy.

Distinguished in Providence & S. S. S. Co. v. Phoenix Ins. Co. 22 Hun, 517, holding the expenses of floating a stranded steamer is a direct result of a peril of the sea and an element of loss under the policy, though it contained no sue and labor clause or warranty against average.

**Average adjustment as precedent condition to insurer's liability.**

Cited in International Nav. Co. v. Atlantic Mut. Ins. Co. 100 Fed. 304, holding the insurer liable for any direct injury to the vessel insured independently of a general average adjustment, such insurer on payment being subrogated to insured's right to a general average contribution.

**Amount of repairs recoverable on valued policy.**

Cited in The St. Johns, 101 Fed. 469, holding that demand and receipt of full amount of policy undervaluing vessel does not of itself import an abandonment, insured having right to recover repairs to full valuation.

Cited in note in 14 E. R. C. 485, on deduction of one third new for old on repairs made on insured vessel.

**Estimation of partial loss by cost of actual or estimated repairs.**

The decision of the Queen's Bench Division was cited in *Pitman v. Universal M. Ins. Co.* L. R. 9 Q. B. Div. 192, 51 L. J. Q. B. N. S. 561, 46 L. T. N. S. 863, 30 Week. Rep. 906, 4 Asp. Mar. L. Cas. 544, 14 Eng. Rul. Cas. 462 (dissenting opinion), on mode of estimating partial loss when insured sells without repairing.

**Dicta as rules of decision.**

The decision of the Court of Appeal was cited in *Re Rosher*, L. R. 26 Ch. Div. 801, 53 L. J. Ch. N. S. 722, 51 L. T. N. S. 785, 32 Week. Rep. 825, holding that a dictum of ancient standing upon which customs and usage have grown and entered into rights will be recognized by courts and given the weight of a decision.

14 E. R. C. 462, *PITMAN v. UNIVERSAL MARINE INS. CO.* 4 Asp. Mar. L. Cas. 544, 51 L. J. Q. B. N. S. 561; 46 L. T. N. S. 863, L. R. 9 Q. B. Div. 192, 30 Week. Rep. 906.

**Mode of estimating underwriters' liability for damage.**

Cited in *Steamship Balmoral Co. v. Marten* [1902] A. C. 511, 71 L. J. K. B. N. S. 819, 87 L. T. N. S. 247, 51 Week. Rep. 175, 7 Com. Cas. 292, 18 Times L. R. 802, reversing [1901] 2 K. B. 896, 70 L. J. K. B. N. S. 1018, 50 Week. Rep. 35, 85 L. T. N. S. 389, 17 Times L. R. 756, 6 Com. Cas. 298, 9 Asp. Mar. L. Cas. 321, holding partial loss was payable in the proportion that the policy valuation bore to the full valuation of the vessel.

**— Expense, repairs or labor.**

Cited in *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 304, holding that upon partial loss of vessel, under valued policy, cost of repairs when made is measure of indemnity against insurers, each insurer being liable for that proportion of amount of its insurance, which cost of repairs bears to policy value; *Hart v. Boston M. Ins. Co.* 26 N. S. 427, holding that delay during time for repairs may be taken into consideration in fixing damage caused by risk insured against; *Field S. S. Co. v. Burr* [1899] 1 Q. B. 579, 68 L. J. Q. B. N. S. 426, 47 Week. Rep. 341, 80 L. T. N. S. 445, 15 Times L. R. 193, 4 Com. Cas. 106, 8 Asp. Mar. L. Cas. 529, holding the extent of liability on a policy insuring the hull and machinery of a vessel against a sea peril is to make good for any deterioration caused by stipulated peril and does not include cost of discharging worthless cargo; *Ruabon S. S. Co. v. London Assurance* [1900] A. C. 6, 69 L. J. Q. B. N. S. 86, 81 L. T. N. S. 585, 48 Week Rep. 225, 9 Asp. Mar. L. Cas. 2, 5 Com. Cas. 71, 16 Times L. R. 90, on the recovery of expenses in executing necessary repairs less the usual allowances; *Bristol Steam Nav. Co. v. Indemnity Mut. M. Ins. Co.* 57 L. T. N. S. 101, 6 Asp. Mar. L. Cas. 173, holding that where new machinery is put in place of the old which has been damaged, the measure of loss and damage is the cost of the new machinery and not the cost of replacing the old; *Marine Ins. Co. v. China Transpacific S. S. Co.* L. R. 11 App. Cas. 573, 56 L. J. Q. B. N. S. 100, 55 L. T. N. S. 491, 35 Week. Rep. 169, 6 Asp. Mar. L. Cas. 68, holding where a ship is repaired by the owner he is as a rule entitled to recover the sum properly expended therefor less the usual allowances.

14 E. R. C. 486, *PALMER v. BLACKBURN*, 1 Bing. 61, 7 J. B. Moore, 339, 25 Revised Rep. 599.

**Mercantile usage as a ground of decision.**

Cited in *Bowen v. Newell*, 2 Duer, 584, holding that in order to entitle the endorser on a note to the benefits of grace, which was allowed by local usage, it

must appear that the parties thereto knew of the usage and intended to adopt it; *Hart v. Shaw*, 1 Cliff, 358, Fed. Cas. No. 6,155, holding parol evidence of a usage inadmissible to overthrow express stipulations restricting or enlarging that usage.

14 E. R. C. 489. *BRUCE v. JONES*, 1 Hurlst. & C. 769, 9 Jur. N. S. 628, 32 L. J. Exch. N. S. 132, 17 L. T. N. S. 748, 11 Week. Rep. 371.

**Full recovery from one co-indemnitor or co-surety.**

Cited in *Ryder v. Phoenix Ins. Co.* 98 Mass. 185, on the early common law rule allowing full recovery from either surety relegate him to his right of contribution; *Seagrave v. Union M. Ins. Co.* L. R. 1 C. P. 305, 1 Harr. & R. 302, 35 L. J. C. P. N. S. 172, 12 Jur. N. S. 358, 14 L. T. N. S. 479, 14 Week. Rep. 690, on full recovery from former insurers as an answer to any further claim.

**Effect of valuation in policy.**

Cited in *The Ferne Holme*, 46 Fed. 119, on the discharge of a valued policy by recovery from concurrent insurers of the same risk; *McLeod v. Universal M. Ins. Co.* 33 N. B. 447, holding recovery proper on a policy covering different interest though insurance from former policies exceeded the valuation in the policy; *Kenny v. Union M. Ins. Co.* 13 N. S. 313, holding policy value conclusive; *Burnand v. Rodocanachi*, L. R. 5 C. P. Div. 424, holding in case of total loss, as between the parties to the policy, the valuation therein is conclusive in respect of all rights and obligations arising therefrom.

Cited in note in 14 E. R. C. 229, on what constitutes a valued policy, and conclusiveness of the valuation.

14 E. R. C. 498, *NEWBY v. REED*, 1 W. Bl. 416.

**Rights under double insurance.**

Cited in *Deming v. Merchants' Cotton-press & Storage Co.* 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89, explaining that the purpose of the "American clause" was to meet the change in the law, introduced by the cited case causing contribution among insurers; *Whiting v. Independent Mut. Ins. Co.* 15 Md. 297, holding same and that the "American clause" applies only to double insurance and does not deprive the prior insurer of his right of subrogation after payment of full amount of insurance; *Park v. Phoenix Ins. Co.* 19 U. C. Q. B. 110, on double insurance as a cause of forfeiture.

Distinguished in *Davis v. Boardman*, 12 Mass. 80, holding where two policies are taken the former having a cancellation clause conditioned on subsequent insurance, it is not a case of double insurance; *American Ins. Co. v. Griswold*, 14 Wend. 399, denying contribution between insurers, under the "American clause" which was introduced after the cited case.

**Contribution among double insurers.**

Cited in *Thurston v. Koch*, 4 Dall. 348, 1 L. ed. 862, Fed. Cas. No. 14,016, holding that an insurer who has paid a loss may recover a pro rata contribution from other insurers on the same property; *McAllister v. Hoadley*, 76 Fed. 1000, on contribution among insurers.

Distinguished in *Connecticut F. Ins. Co. v. Merchants' & M. Ins. Co.* 1 Va. Dec. 592, holding that insurers of the same subject, person, and risk should contribute pro rata to the extinguishment of the amount paid on a loss but that tenants' insurers could not have contribution from insurers of owners of ground rent or mortgagees.

**Subrogation by payment and satisfaction.**

Cited in *Fox v. The Lucy A. Blossom*, Fed. Cas. No. 5,013, holding that where full payment has been made for negligent destruction of a vessel the one paying becomes the owner of the vessel.

**Proof of loss of vessel at sea.**

Cited in *Oppenheim v. Wolf*, 3 Sandf. Ch. 571, holding that facts which are part of experience and common knowledge as to usual duration of voyage across Atlantic, by steam packet ship, are sufficient grounds for judgment of court where question of loss at sea is involved.

14 E. R. C. 502, *TYRIE v. FLETCHER*, Cowp. pt. 2, p. 666.

**Commencement of insurance risk.**

Cited in *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141, holding where an insured vessel, put to sea but returned for repairs because unseaworthy, the risk attached at time of first sailing and remains through to destination; *Ex parte Street*, 2 Upper Can. Jur. 129, holding that if risk is once begun, though it should immediately cease, still the premium shall be paid.

**— “At and from” policies.**

Cited in *Hendrieks v. Commercial Ins. Co.* 8 Johns. 1, holding in an “at and from” policy the risk attaches the moment the policy is effected and there can be no return of premium though no voyage was made.

**Waiver of forfeiture by collection of overdue premium after loss.**

Cited in *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248, holding acceptance of overdue premium after loss did not waive conditions or forfeitures relating to the insurance and not to prepayment; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L.R.A. 317, 21 Am. St. Rep. 203, 25 N. E. 126, holding acceptance of overdue premium after loss was a waiver of the clause stipulating that policy was null and void during period of delinquency; *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111, 20 Am. Rep. 35, holding that the acceptance of over-due premium in full after default and notice of loss, operates to waive the suspension clause and makes the insurer continuously liable.

**Consideration for payment of insurance premium.**

Cited in *Stern v. Rosenthal*, 71 Misc. 422, 128 N. Y. Supp. 711, holding that there can be no contract of insurance unless there be a risk to insure against; *Metropolitan L. Ins. Co. v. Felix*, 73 Ohio St. 46, 75 N. E. 941, 4 Ann. Cas. 121, holding that to constitute a consideration for the premium there must be a contract against which at the time of the execution the insurer cannot interpose a valid defense.

**Return of premiums.**

Cited in *Georgia Home Ins. Co. v. Rosenfield*, 37 C. C. A. 96, 95 Fed. 358, holding if a policy is void ab initio, in the absence of fraud and where the contract is not against law or public morals, the insured may recover all the premiums he has paid; *Clark v. Manufacturers' Ins. Co.* 2 Woodb. & M. 472, Fed. Cas. No. 2,829, holding that premium must be returned even though there was fault and neglect by assured; *Clark v. Manufacturers' Ins. Co.* 2 Woodb. & M. 472, Fed. Cas. No. 2,829, holding that if the risk attached at the time named and continued till lamps were used in violation of warranty no premium could be recovered; *Alabama Gold L. Ins. Co. v. Garmany*, 74 Ga. 51, holding that where the insurer rescinds the policy the measure of recovery by insured is the amount of premiums paid with interest; *Supreme Lodge, K. H. v. Metcalf*, 15 Ind.

App. 135, 43 N. E. 893, holding that where insurance was obtained by false representation as to age so that no risk attached the premiums paid may be recovered; *Metropolitan L. Ins. Co. v. McCormick*, 19 Ind. App. 49, 65 Am. St. Rep. 392, 49 N. E. 44, holding that in case risk has not attached an action will lie for recovery of premium; *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141, holding that premium paid is not recoverable because of failure of ship to make voyage where it started upon voyage but was obliged to return to port because of leaky condition; *Taylor v. Grand Lodge*, A. O. U. W. 96 Minn. 441, 3 L.R.A. (N.S.) 114, 105 N. W. 408, holding the contract of insurance was void from the beginning because of actual fraudulent misrepresentation in application for policy and it was not necessary for insurer to return premium before it could declare the policy of no force; *Parsons v. Lane (Re Millers' & Mfrs.' Ins. Co.)* 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144, holding that if the policy never takes effect the premiums are not earned and the insured if he is not guilty of fraud may recover back the amount he has paid to the insurance company; *Vining v. Franklin F. Ins. Co.* 89 Mo. App. 311, holding in the absence of fraud the insured may recover the entire premium paid on a void policy; *State v. Parker*, 35 N. J. L. 575, holding that where the contract of insurance is entire and the risk has begun to run no apportionment or return of premiums is made and the premium is the property of the insurer; *American Ins. Co. v. Griswold*, 14 Wend. 399, holding that a subsequent insurer may not be compelled to return premium for a short interest unless the deficiency existed at the commencement of the risk; *Steinback v. Rhinelander*, 3 Johns. Cas. 269, holding that the premium and the risk are considerations one for the other and where there is no risk the premium shall be returned; *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19, 58 Am. Rep. 781, 4 N. E. 465, holding that where policy is void ab initio because of innocent mistake on part of insured, the premiums shall be returned with proper interest; *Jones v. Insurance Co. of N. A.* 90 Tenn. 604, 25 Am. St. Rep. 706, 18 S. W. 260, holding in case of no intentional fraud where the risk never attached and was never run the premium if paid is to be returned; *Hawke v. Niagara Dist. Mut. F. Ins. Co.* 23 Grant, Ch. (U. C.) 139, holding there can be no return of premium if risk is once begun; *Bermon v. Woodbridge*, 14 E. R. C. 507, 2 Dougl. K. B. 781, holding that where the risk is one entire voyage, no return is ever made of premiums after the risk has commenced.

Cited in notes in 14 Eng. Rul. Cas. 533, on right to return of premium where contract is avoided at instance of insurer; 14 E. R. C. 539, on right to return of premium where insurance is illegal.

#### **Apportionment of premiums.**

Cited in *Matthews v. American Ins. Co.* 40 Ohio St. 135, holding that the insurer earns no premiums during a "null and void" period caused by delinquency of insured, and the insured is entitled to a credit for that period.

Distinguished in *Waters v. Allen*, 5 Hill, 421, holding that where the risk is sub-divided and different premiums are affixed for each division the premiums should be apportioned to the amount of risk undergone.

#### **14 E. R. C. 507, BERMON v. WOODBRIDGE, 2 Dougl. K. B. 781.**

#### **Right to return of insurance premium.**

Cited in *Hendricks v. Commercial Ins. Co.* 8 Johns. 1, holding that warranty as to time of sailing in insurance policy applied only to voyage, and policy attached on goods on vessel in port and risk having been run, there could be no

return of premium; Columbian Ins. Co. v. Lynch, 11 Johns. 233, holding that if loss happens any time after commencement of risk, there can be no return of premium, where contract is entire one.

#### **Entirety of contract to sail and return.**

Cited in Shaw v. The Lethe, Bee, 424, Fed. Cas. No. 12,721, holding that where a surgeon shipped for a round trip at war wages and while at the opposite port peace was declared, at the arrival home the shipper would have to pay same wages on return trip in spite of lessened risk.

#### **Apportionment of unearned premiums.**

Cited in State v. Parker, 35 N. J. L. 575, holding that in case of fire insurance where the full premiums are paid the risk is entire and the premiums are the property of the insurer and subject to taxation.

#### **Right to disbelieve evidence in part.**

Cited in M'Nutt v. Dare, 8 Blackf. 35, holding that if part of an answer in chancery is read against a party at law the whole must be read and the jury may give it such consideration as they think it merits; Hart v. Ten Eyck, 2 John. Ch. 62, holding that where an answer is read as evidence the jury may believe only part thereof; Mead v. McGraw, 19 Ohio St. 55, holding that the jury may believe any part of the testimony of a witness whom they believe to have sworn falsely, or discredit his entire testimony as they see fit; Baker v. Williamson, 4 Pa. 456, holding that the testimony of a trustee may be taken as to a part of his transactions and not as to others; M'Farland v. Hunter, 8 Leigh, 489, holding that on the production of answers to a bill of discovery the whole shall be read, to be considered by the jury as its own weight shall impress them, affected by other evidence and testimony.

#### **Deviation as question for jury.**

Cited in Child v. Sun Mut. Ins. Co. 3 Sandf. 26, holding that where the evidence as to a deviation is not decisive to prove the fact, it should go to the jury; Foster v. Jackson M. Ins. Co. 1 Edm. Sel. Cas. 290, holding that deviation is a question of fact to be decided by the circumstances of the particular case.

#### **Implied warranty to insurer of seaworthiness at time of sailing.**

Cited in Bowing v. Thebaud, 5 C. C. A. 640, 11 U. S. App. 648, 56 Fed. 520 (affirming a decree which affirmed 42 Fed. 794), holding cost of repairing a leak sprung at dock before sailing was an owner's and not an average loss.

#### **Insurance on alien ship.**

Cited in Furtado v. Rogers, 14 E. R. C. 125, 3 Bas. & P. 191, 6 Revised Rep. 752, as having been decided without objection to the insurance of French ships during hostility with England.

#### **14 E. R. C. 517, LONG v. ALLAN, 4 Dougl. K. B. 276.**

#### **Return of premium on policy avoided by breach of warranty.**

Cited in Taylor v. Grand Lodge A. O. U. W. 96 Minn. 441, 3 L.R.A.(N.S.) 114, 105 N. W. 408, on return of premium where breach of warranty prevents policy from taking effect.

Cited in note in 14 Eng. Rul. Cas. 532, on right to return of premium where contract is avoided at instance of insurer.

#### **Effect of evidence of usage.**

Cited in Bowen v. Newell, 2 Duer, 584, holding that evidence of a usage may vary materially the legal construction of a contract, by adding its own terms

to those of the contract by giving different meaning to words of contract and by superseding a rule of law.

14 E. R. C. 521, BRADFORD v. SYMONDSON, 4 Asp. Mar. L. Cas. 455, 50 L. J. Q. B. N. S. 582, 45 L. T. N. S. 364, L. R. 7 Q. B. Div. 456, 30 Week. Rep. 27.

**Right of insurer to reinsurance.**

Cited in Insurance Co. of N. A. v. Hibernia Ins. Co. 140 U. S. 565, 35 L. ed. 517, 11 Sup. Ct. Rep. 909, holding that in absence of any usage to contrary, original insurer may protect himself by reinsurance to whole extent of his liability.

14 E. R. C. 530, FEISE v. PARKINSON, 13 Revised Rep. 710, 4 Taunt. 640.

**Recovery of unearned premiums, on policy void ab initio.**

Cited in Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865, holding that payments of premiums on policies void ab initio through innocent mistake of insured may be recovered as money had and received; Parsons v. Rich (Re Millers' & Mfrs.' Ins. Co.) 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144, holding that a risk never attached and that the receivers of the insurer must return the amount paid as premiums; Clark v. Manufacturers' Ins. Co. 2 Woodb. & M. 472, Fed. Cas. No. 2,829, holding recovery proper where policy prohibited use of lamps, and lamps were used through a mistake of a former owner of premises, the policy never attached and the use of lamps was not fraudulent; Georgia Home Ins. Co. v. Rosenfield, 37 C. C. A. 96, 95 Fed. 358, holding that where a policy is void ab initio because of breach of clause therein and there is an absence of fraud, premiums may be recovered.

Cited in note in 32 L.R.A.(N.S.) 300, on right to return of premium where policy void or voidable because of insured's misrepresentations.

**— Defense of fraud or illegality.**

Cited in American Mut. L. Ins. Co. v. Bertram, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258, holding that a policy issued to a named beneficiary who had no insurable interest without the knowledge of the assured is void and the premiums may not be recovered; Taylor v. Grand Lodge A. O. U. W. 96 Minn. 441, 3 L.R.A.(N.S.) 114, 105 N. W. 408, on misrepresentation of age to obtain membership in a lodge insuring its members; North American Life Assur. Co. v. Brophy, 2 Ont. L. Rep. 559, holding that when a gambling policy is cancelled the premiums cannot be recovered.

**Fraud as a bar to recovery on implied contract.**

Cited in The Ann C. Pratt, 1 Curt. C. C. 340, Fed. Cas. No. 409, holding that where no recovery may be had on a bottomry bond because of fraud, no recovery for the money loaned thereon may be had on grounds of implied lien.

**Misrepresentation avoiding insurance.**

Distinguished in Kimball v. Aetna Ins. Co. 9 Allen, 540, 85 Am. Dec. 786, holding that a misrepresentation of a promissory nature will not avoid a policy though the risk be increased providing there is an absence of fraud.

**Conditions precedent to insurance.**

Cited in McFaul v. Montreal Island Ins. Co. 2 U. C. Q. B. 59, holding that where policy requires an affidavit of loss within specified time after occurrence thereof a noncompliance with the requirement is a breach of a condition precedent to recovery.

**Proof by one underwriter of contemporaneous representations by assured to other underwriters.**

Cited in *Grant v. Aetna Ins. Co.* C. C. 4 A. C. 490, reversing 11 Lower Can. 128, holding that contemporaneous representations made by assured to other insurers of same subject, may be legally proved.

**Relief in equity against fraud.**

Cited in *Doe ex dem. Jones v. Capreol*, 4 U. C. Q. B. O. S. 227, on relief in equity against fraud.

**14 E. R. C. 533, LOWRY v. BOURDIEU, 2 Doug. K. B. 468.****Recovery of premiums paid on void or canceled insurance.**

Cited in *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264, on the maxim "Ignorantia legis non excusat" as applied to premium paid on an illegal gambling policy; *Wheeler v. Mutual Reserve Fund Life Asso.* 102 Ill. App. 48, holding that where the policy is void as a wager policy, there can be no recovery of premiums thereon; *American Mut. L. Ins. Co. v. Bertram*, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258, holding that the assignee of a policy issued without interest, without knowledge of insured is illegal and a return of premiums may not be had thereon; *Porter v. Bussey*, 1 Mass. 436 (dissenting opinion), on recovery of premium because of a breach of warranty of unseaworthiness; *Parsons v. Lane (Re Millers' & Mfrs' Ins. Co.)* 97 Minn. 98, 4 L.R.A. (N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144, on the recovery of premiums on an illegal policy; *Juhel v. Church*, 2 Johns. Cas. 333, holding that insured cannot sue to recover premium paid on a wager policy; *Barrett v. Elliott*, 10 B. C. 461, on right to recover premium paid where contract was illegal in its inception; *Brophy v. North American L. Assur. Co.* 32 Can. S. C. 261 (affirming 2 Ont. Law Rep. 559), holding that return of premium paid will not be made condition for cancellation of policy under statute, where beneficiary had no insurable interest.

**Recovery of sums paid on insurance by mistake.**

Cited in *Eagan v. Aetna F. & M. Ins. Co.* 10 W. Va. 583, holding that an adjustment made on a void policy where the facts were known to the adjusters is good and the insured may hold them to it.

**Recovery of money paid by mistake.**

Cited in *Washington v. Barber*, 5 Cranch, C. C. 157, Fed. Cas. No. 17,224, holding that where by mistake a license has been paid for which there is no legal requirement, the amount paid cannot be recovered after enjoyment of the license; *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132, holding that where parties contract under mutual mistake of facts supposed to exist, one who pays can recover back money paid; *Livermore v. Peru*, 55 Me. 469, holding that money paid under mistake of law cannot be recovered back; *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614, holding that the indorser who has been induced through ignorance of his legal rights, by indorsee to make good the note indorsed, may not recover what he paid to indorsee; *Clarke v. Dutcher*, 9 Cow. 674, holding that when lessee by mistake for many years paid in excess of rent due he could not recover amount overpaid on grounds of mistake or ignorance of his rights; *Mowatt v. Wright*, 1 Wend. 355, 19 Am. Dec. 508, holding that where money has been paid in settlement of a claim of dower interest and it turns up that no interest existed, such money may not be recovered; *Scott v. Ford*, 45 Or. 531, 68 L.R.A. 469, 78 Pac. 742, holding that money paid to a person under the mistaken impression that such person is a legatee may not be recovered on grounds of mistake of fact where it does not appear that the mistake was as to the truth;

Taylor v. Beaver County, 3 Penr. & W. 112, holding that where a person pays taxes on land not his own and fails therefore to pay on his own, by mistake he may not recover what he has paid on the wrong land; Hinkle v. Eichelberger, 2 Pa. St. 483, on the recovery of a legacy paid by administrator under a void grant of administration.

Distinguished in Galveston County v. Gorham, 49 Tex. 279, holding that taxes paid by mistake of law may not be recovered.

#### **— Of money voluntarily paid.**

Cited in Ritchir v. Summers, 3 Yeates (Pa.) 531, to the point that where consideration for payment of money fails, money may be recovered back; Proctor v. McCall, 8 Rich. L. 425, on the recovery of money voluntarily paid with knowledge of the circumstances; Weatherhead v. Boyers, 7 Yerg. 545, holding that money paid over and above principal and legal rate of interest may be recovered; Morris v. Larin, 1 Dall. 158, 1 L. ed. 76, 1 Am. Dec. 233, holding that where the drawer of a bill paid it with 20 per cent damages on non-acceptance without waiting for protest he may not recover the damages paid.

Distinguished in Galveston County v. Gorham, 49 Tex. 279, holding that occupation tax, voluntarily paid, was not recoverable because exaction was illegal.

#### **Equitable relief from mistake.**

Cited in Champlin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382, holding that courts of equity may grant relief against acts done and contracts executed under mistake of fact.

#### **Right to recover compensation for benefit given free by mistake.**

Cited in Centre Turnp. Co. v. Smith, 12 Vt. 212, holding that where one is permitted to pass toll-gate, toll free, by reason of claim to exemption, he is not liable in assumpsit, for toll, when his claim of exemption is unfounded.

#### **Gaming and wagering insurance.**

Cited in Alsop v. Commercial Ins. Co. 1 Sumn. 451, Fed. Cas. No. 262, on a distinction between gaming and wagering policies.

#### **Equality of wrong between parties as bar to action on illegal contract.**

Cited in Boardman v. Thompson, 25 Iowa, 487, holding that a contract for a contingent fee between lawyer and client is illegal and unenforceable by lawyer; Greffin v. Lopez, 5 Mart. (La.) 145, holding that a vendee in a fictitious sale will be compelled to reconvey the common law not being in force; Breeden v. Frankford M. Acci. & Plate Glass Ins. Co. 220 Mo. 327, 119 S. W. 576, to the point that where money has been paid on illegal consideration, it cannot be recovered back, except in cases of oppression, where parties are not in pari delicto; Ullman v. St. Louis Fair Asso. 167 Mo. 273, 56 L.R.A. 606, 66 S. W. 949; Adams Exp. Co. v. Reno, 48 Mo. 264,—holding that in an executed illegal contract where the parties are in pari delicto the courts will not aid a recovery; White v. Hunter, 23 N. H. 128, holding that the son of the grantor of a deed for an illegal purpose being in pari delicto with the grantees could not be heard to set up the illegality to defeat grantees' title; Welsh v. Cutler, 44 N. H. 561, holding that money lost in gaming cannot be recovered, the parties being in pari delicto; Curtis v. Leavitt, 15 N. Y. 9, on the point that both parties to an illegal contract are equally culpable; Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co. 11 Humph. 1, 53 Am. Dec. 742, holding that the companies not being in pari delicto the courts will grant the plaintiff relief not by way of enforcing the illegal contract but by putting plaintiff in *statu quo*; Lyon v. Strong, 6 Vt. 219, holding that no relief will be

granted against the breath of a contract, made on Sunday, the parties being in pari delicto, the plaintiff's cause of action being based on a violation of law.

— **Effect on collateral rights and claims.**

Cited in *Worcester v. Eaton*, 11 Mass. 368, holding that a deed given to stop prosecution for larceny may not be declared void because of illegality of consideration.

Distinguished in *Bank of United States v. Nörvell*, 2 A. K. Marsh. 101, holding that a bank which buys a promissory note ultra vires may not sue thereon.

**Recovery of money paid on illegal or wagering contracts.**

Cited in *Ellsworth v. Mitchell*, 31 Me. 247, holding recovery cannot be had on an executed illegal contract not malum in se, unless it appear that money paid thereon was for no consideration or by procurement or that there is a statute expressly authorizing recovery; *Ryan v. Judy*, 7 Mo. App. 74, holding that without reference to gaming statutes, there is common law right of action for recovery of stake anytime before wager is determined; *Willie v. Green*, 2 N. H. 333, holding that in the case of a note with usurious interest the amount of such interest paid may be recovered; *Perkins v. Savage*, 15 Wend. 412; *Burt v. Place*, 6 Cow. 431,—holding that where money is received upon illegal contract, both parties being in pari delicto, it cannot be recovered back; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706, holding that where recovery of money requires enforcement of any of the unexecuted provisions of illegal contract, no action can be maintained; *Davenger v. Everett*, 7 Legal Gaz. (Pa.) 222, holding that where one convicted of felony before sentence gives notes to one other than prosecutor to procure his freedom, he may recover money paid thereon; *Thomas v. Shoemaker*, 6 Watts & S. 179, holding that on a suit on a usurious note given under stress of circumstances the defendant can defalcate the amount of excess due to usury from the plaintiff's demand; *Harp v. Chandler*, 1 Strobb. L. 461, on the recovery of money paid on a usurious contract; *Parker v. Kennedy*, 1 Bay, 398, as containing a statement of the decision of another case on recovery of money paid for an illegal service; *Barss v. Strong*, 7 N. S. 450, holding that moneys paid as usury may be recovered back; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781, upholding recovery of money paid on executory contract, ultra vires, but not of itself unlawful.

Cited in note in 13 Eng. Rul. Cas. 352, on wagering policies and their validity.

Distinguished in *Watkins v. Otis*, 2 Pick. 88, on the disability to recover money paid on an illegal bargain or contract; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423, holding seller's agent to sell lottery tickets and who was to stand as buyer for all tickets not returned or accounted for was an equal wrongdoer and could not have trover for such tickets against his principal; *Chase v. Divinal*, 7 Me. 134, 20 Am. Dec. 352, holding that money paid to liberate a raft held up for illegal toll may be recovered on the grounds of compulsion.

— **Executed contracts.**

Cited in *Adams v. Barrett*, 5 Ga. 404, holding that a court of law will not interfere with an illegal executed contract; *Ingram v. Mitchell*, 30 Ga 547, on executed illegal contract the parties being in pari delicto; *Mudgett v. Morton*, 60 Mo. 260, holding the illegality of a contract will afford no ground for recovery when executed, in the absence of deceit or fraud; *Frick v. Hammond*, 2 Clark (Pa.) 156; *Perkins v. Eaton*, 3 N. H. 152,—holding that if money put upon wager has been actually paid over to winner, no action can be maintained to recover it back.

Distinguished in *Canadian P. R. Co. v. Ottawa F. Ins. Co.* 39 Can. S. C. 405,

holding that the premiums could be recovered on the ground that the risk did not attach to the particular kind of property lost.

**— Executory contracts.**

Cited in *Knowlton v. Congress & E. Spring Co.* 14 Blatchf. 364, Fed. Cas. No. 7,903, holding that in an illegal purchase of stock an action will be to recover money paid therefor so long as the deal remains executory; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347, holding that an instalment paid on an illegal increase of stock might be recovered, the deal being executory; *White v. Franklin Bank*, 22 Pick. 181, holding that a deposit made against the rules and charter of a bank may be recovered where the time of payment of the deposit has not arrived, the agreement being executory; *Cutshall v. McGowan*, 98 Mo. App. 702, 73 S. W. 933, holding that a wager may be recovered from the stockholder if a protest or dissent is made before the event happened; *Fairbanks v. North Bend*, 68 Neb. 560, 94 N. W. 537, holding that where the parties to an illegal contract stopped short of the consummation of an illegal purpose money paid by one of the parties to the other may be recovered; *Hunckle v. Francis*, 27 N. J. L. 55, holding that money bet on a horse race may be recovered from the stakeholder if demanded before paid to the winner of the bet; *Morgan v. Groff*, 4 Barb. 524, holding that where plaintiff sent money to defendant to bet with a certain person and the defendant bet with another person, the agreement was still executory and the plaintiff could recover even after payment of money by stakeholder; *Bernard v. Taylor*, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 693, 31 Pac. 968, holding that when plaintiff bet on a foot race but demanded return of his stake before race was run he may recover same from stakeholder though the money has been paid to winner.

Cited in *2 Mechem, Sales*, 864, on right of party to unlawful contract to withdraw therefrom before completion.

**Mistake of law, as an excuse.**

Cited in *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189, holding that ignorance or mistake is no excuse or justification for a breach of the law.

**Insurable interest.**

Cited in *Davies v. Home Ins. Co.* 24 U. C. Q. B. 364, holding that general creditor has no insurable interest in goods of debtor.

**14 E. R. C. 538, VANDYCK v. HEWITT, 1 East, 96, 5 Revised Rep. 516.**

**Actions founded on illegal transactions.**

Cited in *Galt v. Jackson*, 9 Ga. 151, holding that a conveyance of property to defeat the attachment of expected judgments is illegal and the vendor may not have the aid of the courts for reconveyance; *Worcester v. Eaton*, 11 Mass. 368, holding that conveyance of land made in consideration of composition of felony cannot be recovered by grantor; *Gregg v. Wyman*, 4 Cush. 322, holding that owner of horse who lets him on Sunday to be driven to particular place, but not for any purpose of necessity or charity, cannot recover for injuries to horse caused by immoderate driving; *Groton v. Waldoborough*, 11 Me. 306, 26 Am. Dec. 530, holding that money paid to town for office of constable, it having been put at auction prior to choice, cannot be recovered back; *White v. Hunter*, 23 N. H. 128, holding that money paid on contract that is contrary to public policy cannot be recovered back by party who paid it, where parties were in pari delicto; *Beach v. Kezar*, 1 N. H. 184, holding that one who assisted in obtaining beef for a hostile army may not recover for the assistance or the beef.

**— Wagering contracts.**

Cited in *Ball v. Gilbert*, 12 Met. 397, holding that stakeholder is liable in trustee process to creditor of either of persons who deposited money with him as wager on result of election; *Perkins v. Eaton*, 3 N. H. 152, holding that in the case of an illegal wager the money or property placed in the hands of the stakeholder may be recovered until it has passed from his hands; *Friek v. Hammond*, 2 Clark (Pa.) 156, holding that after a payment of a wager by the stakeholder before notice a recovery by the loser may not be had, since in order to establish his claim he must prove the consummation of a delict.

**— Recovery of premium paid on illegal insurance.**

Distinguished in *American Mut. L. Ins. Co. v. Bertram*, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258, holding that an action will lie in favor of the assignee of a void policy of insurance for the recovery of premiums paid thereon, assignee having been imposed upon by the insurer.

**Persons in pari delicto.**

Cited in *Deming v. State*, 23 Ind. 416, holding that where one of the parties to an illegal contract has an unfair advantage over the other they are not in pari delicto and recovery may be had; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742, holding that where two insurance companies acting ultra vires were not in pari delicto the one less at fault could recover a balance of account in its favor against the other on a bill for that purpose.

Cited in *Keener, Quasi Contr.* 269, on denial of recovery by party in default where both parties are in pari delicto.

**14 E. R. C. 541, CALTON v. BRAGG, 15 East, 223, 13 Revised Rep. 451.****Interest as damages.**

Cited in *Anderson v. State*, 2 Ga. 370, holding an agent who admits money in his hands belonging to his principal is liable for interest thereon from the time he received it; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544, holding plaintiff not entitled to interest on amount found in a verdict for damages in action for breach of warranty; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Reid v. Rensselaer Glass Factory*, 3 Cow. 393,—holding as a general rule interest is allowable on cash advances though they rest in the form of a mutual, current and unliquidated account; *Simpson v. M'Million*, 1 Nott. & M'C. 192, as to it generally being given on ground of contract and not as damages; *Hammond v. Hammond*, 2 Bland, Ch. 306; *Mercer v. Beale*, 4 Leigh, 189,—as to when recoverable.

**— Necessity of demand or equivalent.**

Cited in *Barrow v. Reab*, 9 How. 366, 13 L. ed. 177, holding formerly the laws of Louisiana did not allow interest on accounts or unliquidated claims, but now it is due from the time the debtor is put in default for the payment of the principal; *Pullen v. Chase*, 4 Ark. 210, holding under statute promissory note payable on demand draws interest from date; *Gay v. Rooke*, 151 Mass. 115, 7 L.R.A. 392, 21 Am. St. Rep. 434, 23 N. E. 835, holding that interest will be allowed in suit to recover amount due under instrument which is mere acknowledgement of debt, only from date of service of writ, if there was neither demand nor stipulated time for payment; *Simons v. Walter*, 1 M'Cord, L. 97, holding where money has been paid by mistake interest can only be allowed from a demand and a refusal.

**— In common assumpsit.**

Cited in *Pope v. Barrett*, 1 Mason, 117, Fed. Cas. No. 11,273, holding interest

allowable in actions for money had and received from the time of a demand made, where defendant has refused to account or make payment or has converted the money to his own use; *Moore v. Patton*, 2 Port. (Ala.) 451, holding interest recoverable on an open account for goods sold and delivered, where by express stipulation the account is to be considered due at a particular day; *McIlvaine v. Wilkins*, 12 N. H. 474, holding in assumpsit for goods sold and delivered the jury should allow interest by way of damages for the detention of the debt upon the amount they find due, from the time of demand of payment if one be proved, or if no demand, from the commencement of suit; *Goddard v. Bulow*, 1 Nott. & M'C. 45, 9 Am. Dec. 663, holding interest may be recovered in an action for money had and received where there is proof, or where from circumstances it can be inferred that it has been employed, or wherever it has been obtained by fraud, extortion or oppression.

**Deduction of rules of law from precedents.**

Cited in *Braddee v. Brownfield*, 2 Watts & S. 271; *Custer v. Detteler*, 3 Watts & S. 28,—as to their being collected from decided cases.

**Practise of court as law of court.**

Cited in *Long v. Rodgers*, 19 Ala. 321 (dissenting opinion); *The Free State*, 1 Brown, Adm. 251, Fed. Cas. No. 5,090,—as to practice of court being law of the court.

**Dicta as authority.**

Cited in *Tait v. New York L. Ins. Co.* 1 Flipp. 288, Fed. Cas. No. 13,726, as when it should be so considered.

14 E. R. C. 546, *COOK v. FOWLER*, 43 L. J. Ch. N. S. 855, L. R. 7 H. L. 27.

**Interest after maturity of demand.**

Cited in *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920, as to interest after maturity being in nature of damages for non-performance of contract; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564, holding act providing certain rate of interest after maturity for money loaned did not apply to contracts in which there was an agreement as to rate of interest after maturity; *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52, holding note draws statutory rate of interest after default and not interest stipulated in note; *Union Inst. for Savings v. Boston*, 129 Mass. 82, 37 Am. Rep. 305, holding under statute if the parties to a contract stipulate for a higher rate of interest than six per cent interest after the breach of the contract is ordinarily measured by the rate stated in the contract to the time of payment or of judgment; *Seton v. Hoyt*, 34 Or. 266, 43 L.R.A. 634, 75 Am. St. Rep. 641, 55 Pac. 967, holding rate of interest on county warrants indorsed "not paid for want of funds" is the rate prevailing at the date of such indorsement and cannot afterwards be reduced; *Allan v. McTavish*, 8 Ont. App. Rep. 440, as to it being province of jury to determine what interest if any the debt bore after maturity; *St. John v. Rykert*, 4 Ont. App. Rep. 213, holding where a note is made payable at a certain rate of interest until paid the holder is entitled to enforce payment with interest at that rate until judgment, but after judgment interest at legal rate only is recoverable; *Muttlebury v. Stevens*, 13 Ont. Rep. 29; *Powell v. Peck*, 15 Ont. App. Rep. 138,—holding *prima facie* the rate stipulated for in contract up to the time certain may be adopted as reasonable rate to be awarded as damages; *Sinonton v. Graham*, 8 Ont. Pr. Rep. 495, holding where no rate of interest is fixed by a mortgage to be paid after maturity the rate of interest mentioned in

the mortgage is chargeable but the person seeking to reduce it may show that it is more than the ordinary value of money; *Duncan v. Ewing*, 3 Tenn. Ch. 29; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1; *Archbold v. Building & L. Asso.* 15 Ont. Rep. 237; *St. John v. Rykert*, 10 Can. S. C. 278; *People's Loan & D. Co. v. Grant*, 18 Can. S. C. 262; *Freehold Land Co. v. McLean*, 8 Manitoba L. Rep. 116; *R. ex rel. Atty. Gen. v. Grand Trunk R. Co.* 2 Can. Exch. 132,—holding interest on bond after default recoverable as damages but contract for continuance of same rate of interest after as before default cannot be implied; *Noble v. Newfoundland*, *Newfoundl. Rep.* (1897–1903) 601 (dissenting opinion), as to interest not being due in action for money secured by mortgage, after default, without contract to pay interest after default; *Dalby v. Humphrey*, 37 U. C. Q. B. 514, holding where a day is named for the payment of a note with interest at a rate specified, the claim for interest after that day is a claim for damages for breach of the contract not as upon an implied contract, and is in the discretion of court or jury; *Goldstrom v. Tallerman*, L. R. 18 Q. B. Div. 1, 56 L. J. Q. B. N. S. 22, 55 L. T. N. S. 866, 35 Week. Rep. 68; *Wallington v. Cook*, 47 L. J. Ch. N. S. 508,—holding there is no rule of law that, upon a contract for payment of money on a day certain, with interest at a fixed rate, down to that day, a further contract for the continuance of the same interest is implied.

Cited in note in 26 L. ed. U. S. 531, on rate of interest after maturity.

Cited in *Parsons*, Partn. 4th ed. 203, on rate of interest on advances by one partner to firm.

Distinguished in *Capen v. Crowell*, 66 Me. 282; *St. John v. Rykert*, 26 Grant, Ch. (U. C.) 249,—holding where a promissory note is made payable with interest at a certain rate until paid the holder is entitled to enforce payment with interest at that rate, after maturity of note; *Re Dixon* [1899] 2 Ch. 561 [1900] 2 Ch. 561, 83 L. T. N. S. 129, 48 Week. Rep. 665, 69 L. J. Ch. N. S. 689, 48 Week. Rep. 71, holding interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain even although no express mention of interest is made in the bond.

#### **— Before maturity as matter of contract.**

Cited in *Reid v. Wilson*, 9 Ont. Pr. Rep. 166, holding where no interest is reserved by a mortgage none is recoverable until after the day appointed for the payment of the principal.

14 E. R. C. 565, *BURDICK v. GARRICK*, 39 L. J. Ch. N. S. 369, L. R. 5 Ch. 233, 22 L. T. N. S. 502, 18 Week. Rep. 387.

#### **Trustees, who are.**

Cited in *Haggerty v. Badkin*, 72 N. J. Eq. 473, 66 Atl. 420, holding that upon dissolution of firm surviving partner became trustee of fund contributed to partnership and was liable in equity to process against body for failure to comply with decree requiring accounting; *Re Preston*, 13 Ont. L. Rep. 110, holding express trust may be created by parol; *Day v. Day*, 17 Ont. App. Rep. 157, as to what constitutes express trust within meaning of statute; *Dooby v. Watson*, L. R. 39 Ch. Div. 178, 57 L. J. Ch. N. S. 865, 58 L. T. N. S. 943, 36 Week. Rep. 764, as to when solicitor is trustee for client; *Soar v. Ashwell* [1893] 2 Q. B. 390, 4 Reports, 602, 69 L. T. N. S. 585, 42 Week. Rep. 165, holding solicitor who handled trust funds for trustee liable as trustee.

#### **— Liability and duties of.**

Cited in *Underhill*, Am. Ed. Trusts, 451, on solicitor trustee using trust funds

in his business; 2 Beach, Trusts, 1255, 1257, on liability of trustee for delay in investment of trust funds; Underhill, Am. Ed. Trusts, 445, 447, on measure of trustee's responsibility.

**Statute of limitations in actions against trustees.**

Cited in *Re McRae*, 28 N. S. 20 (dissenting opinion); *Bailey v. Jellett*, 9 Ont. App. Rep. 187,—as to it not applying to trustee; *Re Sharpe* [1892] 1 Ch. 154, holding in action by liquidator against directors of corporation for money paid out of capital to shareholders as interest the directors could not avail themselves of statute; *Kent v. Kent*, 20 Ont. Rep. 445; *Berteau v. Jillard*, Newfoundl. Rep. (1897-1903) 53; *Gray v. Bateman*, 21 Week. Rep. 137,—holding trustee cannot avail himself of statute; *Fliteroft's Case*, L. R. 21 Ch. Div. 519, 16 Eng. Rul. Cas. 263, 52 L. J. Ch. N. S. 217, 48 L. T. N. S. 86, 31 Week. Rep. 174, holding statute of limitations did not apply in action for breach of trust; *Pick v. Edwards*, 3 N. B. Eq. Rep. 410; *Thorne v. Perry*, 2 N. B. Eq. Rep. 146; *Lyell v. Kennedy*, L. R. 14 App. Cas. 437, 59 L. J. Q. B. N. S. 268, 62 L. T. N. S. 77, 38 Week. Rep. 353, 16 Eng. Rul. Cas. 343,—holding where the duty of a person is to receive property and hold it for another and keep it till called for he cannot discharge himself from that trust by appealing to lapse of time.

Cited in note in 16 E. R. C. 268, 270, on running of limitations in case of breach of fiduciary duty.

Cited in Underhill, Am. Ed. Trusts, 477, on running of limitations or laches in case of trustee's breach of trust.

**— Against agents or bare depositaries.**

Cited in *Re Taylor*, 28 Grant, Ch. (U. C.) 640; *Ross v. Robertson*, 7 Ont. L. Rep. 413; *Smith v. Redford*, 19 Grant, Ch. (U. C.) 274; *Coyne v. Broddy*, 13 Ont. Rep. 173,—holding trust arising from mere agency did not prevent operation of statute; *Re Bell*, L. R. 34 Ch. Div. 462, 56 L. J. Ch. N. S. 307, 55 L. T. N. S. 757, 35 Week. Rep. 212, holding agent who received money in fiduciary character and with full knowledge of the trust could not set up statute of limitations as bar to claim against him for the money.

Distinguished in *Re Kirkpatrick*, 3 Ont. Rep. 361, holding where claim is of debtor and creditor character with a quasi fiduciary relationship superinduced the debtor may plead statute; *Friend v. Young*, 16 E. R. C. 193, [1897] 2 Ch. 421, 66 L. J. Ch. N. S. 737, holding under facts the existence of the fiduciary relation of principal and agent did not prevent the application of the statute of limitations; *Banner v. Berridge*, L. R. 18 Ch. Div. 254, 50 L. J. Ch. N. S. 630, 44 L. T. N. S. 680, 29 Week. Rep. 844, 4 Asp. Mar. L. Cas. 420, holding first mortgagee who had sold ship upon mortgagor becoming bankrupt might plead statute against second mortgagee in action for accounting; *Watson v. Woodman*, L. R. 20 Eq. 721, 45 L. J. Ch. N. S. 57, 24 Week. Rep. 47, holding though the debt was from solicitors to a client in respect to moneys received there was not express trust to exclude operation of statute.

**Statute of limitations as to personal representatives.**

Cited in *Dunlap v. Dunlap*, 1 N. B. Eq. Rep. 72, holding statute does not begin to run till administrator is appointed; *Doige v. Mimms*, 13 Manitoba L. Rep. 48, as to when statute begins to run; *Ritchey's Estate*, 8 Pa. Super. Ct. 527, holding that the filing of an account by an executor in the orphan's court, whether under the compulsion of a citation sur petition, or by voluntary act,

tolls the running of the statute as to the fund brought unto court by the account in respect to claims presented before final adjudication.

#### **Interest against trustees.**

Cited in *Pulliam v. Pulliam*, 10 Fed. 53; *Re Honsberger*, 10 Ont. Rep. 521, —as to rule in allowing interest against executors; *Inglis v. Beaty*, 2 Ont. App. Rep. 453, holding the principle upon which the court acts in charging executors with interest is not that of punishment, but of compensating the cestui que trust, and depriving the trustee of the advantage he has wrongfully obtained; *Gilroy v. Stephens*, 51 L. J. Ch. N. S. 834, 46 L. T. N. S. 761, 30 Week. Rep. 745, as to amount recoverable from trustee who has allowed agent to receive and retain the interest.

Cited in note in 2 E. R. C. 174, on liability for interest of personal representative keeping balances uninvested.

Distinguished in *Phillips v. Homfray*, L. R. 44 Ch. Div. 694, 59 L. J. Ch. N. S. 547, 62 L. T. N. S. 897, 39 Week. Rep. 45, holding in an action for trespass for minerals wrongfully taken where there is no fiduciary relation between the parties interest could not be recovered; *Silkstone & H. M. Coal Co. v. Edey* [1900] 1 Ch. 167, 69 L. J. Ch. N. S. 73, 48 Week. Rep. 137, holding upon the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the court to charge the trustee with interest on the rents and profits received by him since the date of sale.

#### **— Compound interest.**

Cited in *Forbes v. Ware*, 172 Mass. 306, 52 N. E. 447, holding guardian not chargeable with compound interest unless the neglect is so gross as to warrant the presumption that he received or ought to have received that also; *McKnight v. Walsh*, 24 N. J. Eq. 498, holding that where profits made by trustee cannot be traced, it is proper in stating his account to make annual rests, and charge interest upon interest; *Hazard v. Durant*, 14 R. I. 25, holding it not appearing that trustee made any profit or more than simple interest on the funds not invested, he was only chargeable with simple interest.

Cited in note in 29 L.R.A. 624, 630, on liability of executors, trustees, etc., for compound interest.

#### **Suits against married women.**

Cited in *Walsh v. Nugent*, 1 N. B. Eq. Rep. 335, as to necessity of husband being made party.

#### **Costs.**

Distinguished in *Merry v. Nickalls*, L. R. 8 Ch. 205, 3 Eng. Rul. Cas. 262, 42 L. J. Ch. N. S. 479, 28 L. T. N. S. 296, 21 Week. Rep. 305, holding in absence of special circumstances applicant for stay of proceedings pending appeal must pay costs.

14 E. R. C. 578,\* **CHOLMONDELEY v. CLINTON**, 2 Jac. & W. 1, 22 Revised Rep. 83, on further hearing after opinion reported in 2 Meriv. 171, 16 Revised Rep.

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\*Note. Many of the citations of this case apply to the opinions rendered in the House of Lords and reported in 4 Bligh 1, but not included in the portions of the case reported in the English Ruling Cases. The points involved in these citations mostly relate to the relative rights of mortgagee in possession and mortgagor and to the time in which the right to redeem is barred, which questions are

167. Appeal dismissed on other grounds in House of Lords in 4 Bligh 1. Answers by the Court of King's Bench to certified questions in 2 Barn. & Ald. 625.

#### **Construction of instruments.**

Cited in Young v. Kinnebrew, 36 Ala. 97, holding that in cases of executed trusts, court of equity will construe limitations in same manner as similar legal limitations; Aguirre v. Alexander, 58 Cal. 21, as to interpretation of description in deed; Lyman's Petition, 11 R. I. 157, as to construction of settlement in trust deed as to who was entitled to first beneficial interest; Bell v. McKinsey, 3 U. C. Err. & App. 9 (dissenting opinion), on construction of words "now next" in lease referring to date of its expiration, when not executed until after day of its date; James v. Plant, 10 E. R. C. 279, 4 Ad. & El. 749, 6 Nev. & M. 282, on construction of a deed.

Cited in 1 Beach Contr. 892, on construction of deeds; 3 Washburn, Real Prop. 6th ed. 415, 416, on recitals in deeds and their effect; 2 Devlin, Deeds, 3d ed. 1569, on giving preference to intent over technical import and form.

#### **— Intent exhibited in other parts of writing or extrinsic thereto.**

Cited in Maker v. Lazell, 83 Me. 562, 23 Am. St. Rep. 795, 22 Atl. 474, holding where a limitation in a deed is perfect and complete it cannot be controlled by intention collected from other parts of the same deed; Kirk v. Burkholz, 3 Tenn. Ch. 421; Bucher v. Hicks, 7 Lea, 207,—holding court will look to whole instrument without reference to formal divisions in order to ascertain intention of parties and not allow technical rules to override the intent; Sears v. Russell, 8 Gray, 86; Sisson v. Donnelly, 36 N. J. L. 432; Fisk v. Brayman, 21 R. I. 195, 42 Atl. 878; Seabrook v. Seabrook, M'Mull. Eq. 201,—holding intention should prevail provided it not inconsistent with settled rules of law; Adamson v. Adamson, 17 Ont. Rep. 407, holding intention of parties must be respected; Pearson v. Mulholland, 17 Ont. Rep. 502, holding deed shall never be void where the words may be applied to any intent to make it good; Walsh v. Trevanion, 2 E. R. C. 739, 19 L. J. Q. B. N. S. 458, 15 Q. B. 733, holding that where the operative words of a deed are clear and unambiguous their meaning cannot be altered by inference, from the recital, of a different intention.

#### **— Limitations repugnant to gift.**

Cited in Lee v. Ellsberry, 82 Ark. 209, 12 L.R.A.(N.S.) 956, 118 Am. St. Rep. 60, 101 S. W. 407, holding where granting clause in a deed conveys the land described to the grantee in fee simple, a proviso in the habendum clause limiting the estate conveyed in certain contingencies to a life estate is repugnant to the granting clause and void; St. Amour v. Rivard, 2 Mich. 294, holding that executory devise directing limitations beyond period allowed by law is void for the whole and not merely for excess beyond legal period; Philadelphia v. Girard, 45 Pa. 9, 20 Phila. Leg. Int. 220, holding that where a vested estate is distinctly given, and there are annexed to it conditions, limitations, powers, trusts (including trusts for accumulation) or other restraints relative to its use, management, or disposal, that are not allowed by law, it is these restraints, and the estates limited on them that are void, and not the principal or vested estate.

#### **Construction of contracts by intent.**

Cited in Koonce v. Bryan (1 Dev. & B. Eq.) 21 N. C. 227, holding they should be construed according to their true intent and not their strictly verbal sense: said to have been set at rest in England by the Statute of 3 & 4 Will. IV. chap. 46. (Editor.)

Trigg v. Read, 5 Humph. 529, 42 Am. Dec. 447, as to family compromise being upheld in court of equity when there is doubt as to the construction of the instruments; Kunkel v. Macgill, 56 Md. 120, as to construction.

**"Right heirs."**

Cited in Seabrook v. Seabrook, 10 Rich. Eq. 495, holding testator's widow is included under term "right heirs" used in testator's will.

**Rights between mortgagor and mortgagee.**

Cited in Butt v. Maddox, 7 Ga. 495, as to nature of mortgage; Down v. Lee, 4 Manitoba L. Rep. 177, holding that fact that defendant held mortgage on wheat destroyed by fire which was started by his negligence, is no defense to action against him for such negligence brought by owner and mortgagor.

Cited in note in 18 Eng. Rul. Cas. 376, on mortgagor's estate in mortgaged property till foreclosure.

Cited in 2 Washburn, Real Prop. 6th ed. 147, on mortgagor's power to make lease or conveyance which will bind or prejudice mortgagee.

**— Trust relation or legal title.**

Cited in Sturdevant v. Mather, 20 Wis. 576, as to how far the principles applicable to dealings between trustee and cestui que trust apply to mortgagor and mortgagee; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275, as to mortgagee in possession being trustee for mortgagor in limited sense; Walker v. Farmers' Bank, 8 Houst. (Del.) 258, 10 Atl. 94; Clarke v. Sibley, 13 Met. 210,—as to when mortgagee in possession is trustee for mortgagor; Ten Eyck v. Craig, 62 N. Y. 406, as to rights and relation of mortgagors and mortgagees; Fielder v. Carpenter, 2 Woodb. & M. 211, Fed. Cas. No. 4,759, as to mortgagor being tenant at will of mortgagee; Ten Eyck v. Craig, 2 Hun, 452, holding relation between a mortgagee in possession and the mortgagor does not prevent him from purchasing outstanding title to the property; Farrar v. Farrars, L. R. 40 Ch. Div. 395, 58 L. J. Ch. N. S. 185, 60 L. T. N. S. 121, 37 Week. Rep. 196, holding if in exercise of power of sale mortgagee takes reasonable precautions to obtain proper price the mortgagor has no redress even though more might have been obtained for the property if sale had been postponed; Warner v. Jacob, L. R. 20 Ch. Div. 220, 18 E. R. C. 452, 51 L. J. Ch. N. S. 642, 46 L. T. N. S. 656, 30 Week. Rep. 721, holding a mortgagee in exercising his power of sale is not, except as to the balance of the purchase money, a trustee for the mortgagor even if the mortgage is in the form of a trust for sale; King v. State Mut. F. Ins. Co. 7 Cush. 1, 54 Am. Dec. 683; Boest v. Boyd, 3 Sandf. Ch. 501; Pearce v. Morris, L. R. 5 Ch. 227, 39 L. J. Ch. N. S. 342, 22 L. T. N. S. 190, 19 Week. Rep. 196; Magnus v. Queensland Nat. Bank, L. R. 36 Ch. Div. 25,—holding mortgagee is in fiduciary position toward mortgagor.

**— Possession.**

Cited in Murdock v. Clarke, 3 Cal. Unrep. 265, 24 Pac. 272, to the point that mortgagee in possession is only trustee to limited extent; Doe ex dem. Shute v. Grimes, 7 Blackf. 1, holding mortgagee of real estate has a right to the immediate possession of the mortgaged premises, unless there be an agreement to the contrary expressed in the mortgage or plainly inferable from it; The J. B. Lunt v. Merritt, Fed. Cas. No. 7,247; Ashhurst v. Montour Iron Co. 35 Pa. 30,—as to court of equity not interfering to prevent mortgagee from taking possession after condition broken; Fenwick v. Macey, 1 Dana, 276, holding that possession of mortgagee being amicable, statute of limitations does not affect right of either, in equity or at law; Mann v. English, 38 U. C. Q. B. 240, holding if default arise the mortgagee has a right without demand of possession or notice to quit to take immediate and actual possession of the property.

**— Merger and discharge.**

Cited in *Van Amburgh v. Kramer*, 16 Hun, 205, holding mortgage passes to executors as chose in action and is extinguished by payment of debt to which it is attached; *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884, as to necessity of conveyance by mortgagee upon satisfaction of mortgage; *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed. Cas. No. 1,331, as to admissibility of parol proof of a defeasance.

**— Redemption from mortgage.**

Cited in *Stark v. Cheathem*, 2 Tenn. Ch. 300, as to right of subsequent lien creditor to redeem.

Cited in 2 *Washburn*, Real Prop. 6th ed. 154, on who may redeem from mortgage.

**— Necessary parties to action to redeem from mortgage.**

Cited in *Johnson v. Harmon*, 19 Iowa, 56, holding a junior encumbrancer is not barred of his right to redeem against a senior encumbrancer by a decree in foreclosure proceedings to which he was not a party; *Bolton v. Salmon* [1891] 2 Ch. 48, holding where mortgage is made by two tenants in common both of them must be parties to action to redeem.

Cited in note in 18 Eng. Rul. Cas. 495, on necessity of making all persons interested in mortgage security or in equity of redemption parties to action to redeem or foreclosure.

Cited in 2 *Washburn*, Real Prop. 6th ed. 159, on parties to bill to redeem from mortgage.

**— Necessary parties in action to foreclose mortgage.**

Cited in *Slaughter v. Foust*, 4 Blackf. 379, as to who are.

Cited in 2 *Washburn*, Real Prop. 6th ed. 230, on parties to foreclosure proceeding.

**— Costs in action to redeem.**

Cited in *Slee v. Manhattan Co.* 1 Paige, 48, holding where mortgagee sets up an unconscientious defense he will be refused costs and must pay costs to other party.

**Trustees' duty as to beneficiary's estate.**

Cited in *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499, holding trustee estopped from denying title of cestui que trust; *Needles v. Martin*, 33 Md. 609, as to when equity will compel execution of the trust; *Perkins v. Burlington Land & Improv. Co.* 112 Wis. 501, 88 N. W. 648, holding in action for construction of trust deed trustee was representative of unborn beneficiaries; *Soar v. Ashwell* [1893] 2 Q. B. 390, 4 Reports, 602, 69 L. T. N. S. 585, 42 Week. Rep. 165, as to duty of trustees having property of others under their control.

Cited in 2 *Washburn* Real Prop. 6th ed. 451, on equitable nature of interest of cestui que trust; 2 *Washburn*, Real Prop. 6th ed. 376, as to how uses may be lost.

**Parol evidence to establish trust.**

Cited in *Hunter v. Marlboro*, 2 Woodb. & M. 168, Fed. Cas. No. 6,908, as to when trust may be established by parol; *Troll v. Carter*, 15 W. Va. 567, holding whenever the courts permit parol evidence to be received to establish a trust, they require such evidence to be clear and unquestionable to produce such result.

**Equitable estate.**

Cited in *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. ed. 869; *Croxall v. Sherrerd* (Den ex dem. *Croxall v. Sherrerd*), 5 Wall. 268, 18 L. ed. 572,—as to

whatever is true at law of legal estate being true in equity of trust estate; *Re Flatt*, 18 Ont. App. Rep. 1, as to what constitutes equity between vendor and purchaser.

#### **Statute of limitations.**

Cited in *Taylor v. Benham*, 5 How. 233, 12 L. ed. 130; *Hepburn's Case*, 3 Bland, Ch. 95,—as to it being statute of repose; *Charle v. Saffold*, 13 Tex. 94, holding it a statute of repose.

#### **Statute of limitations in equity.**

Cited in *Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610, holding that in case of implied trust, unless there has been fraudulent concealment of cause of action, lapse of time is complete bar in equity; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289, holding that where adverse possession has continued for twenty years, it constitutes complete bar in equity, whenever ejectment would be barred if plaintiff had legal title; *Miller v. M'Intyre*, 6 Pet. 61, 8 L. ed. 320, holding that statute of limitations operates where conflicting titles are adverse in their origin, in equity as well as at law; *Robinson v. Hook*, 4 Mason, 139, Fed. Cas. No. 11,956; *Sis v. Boarman*, 11 App. D. C. 116; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *Campau v. Chene*, 1 Mich. 400; *Perry v. Craig*, 3 Mo. 516; *People v. Clarke*, 9 N. Y. 349; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Humbert v. Trinity Church*, 24 Wend. 587; *Humbert v. Trinity Church*, 7 Paige, 195; *Porter v. Cocke, Peck (Tenn.)* 30; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Rowe v. Bentley*, 29 Gratt. 756; *Hutcheson v. Grubbs*, 80 Va. 251,—holding courts of equity follow law in respect to limitations; *Piatt v. Vattier*, 1 McLean, 146, Fed. Cas. No. 11,117, holding lapse of time may be applied under proper circumstances to bar an equity, where the statute would not bar; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *Lewis v. Baird*, 3 McLean, 56, Fed. Cas. No. 8,316; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388,—holding lapse of time barred equitable relief; *Rice v. Pennypacker*, 5 Houst. (Del.) 279, as to equity following law in regard to statute of limitations; *Campbell v. Long*, 20 Iowa, 382, as to effect of ignorance of right upon operation of statute in equity; *Sherwood v. Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782; *Wells v. Child*, 12 Allen, 333,—holding statute begins to run in equity from time of discovery of the fraud; *Hall v. McCormick*, 7 Tex. 269, as to fraud preventing bar of; *Chapin v. Wright*, 41 N. J. Eq. 438, 5 Atl. 574; *Cresap v. M'Lean*, 5 Leigh. 381; *Baker v. Morris*, 10 Leigh, 284,—holding equitable claim barred after lapse of twenty years; *Paschall v. Hinderer*, 28 Ohio St. 568, holding that an equity is not rendered stale simply by the lapse of time; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265, holding equity will refuse to grant injunction to one who has unreasonably delayed independent of statute of limitations; *Re McAfee*, N. B. Eq. Cas. 438, as to equitable bar by lapse of time; *Pick v. Edwards*, 3 N. B. Eq. 410, holding that where defendant received rent for twenty-five years without accounting, right to require account was not barred by lapse of time.

Cited in 2 Washburn, Real Prop. 6th ed. 161, on bar by limitation of right to redeem.

#### **To bar trust.**

Cited in *Piatt v. Oliver*, 2 McLean, 267, Fed. Cas. No. 11,115; *Baker v. Whiting*, 3 Sumn. 475, Fed. Cas. No. 787,—holding in equity length of time is no bar to a trust clearly established; *Trecothick v. Austin*, 4 Mason, 16, Fed. Cas. No. 14,164, holding trusts devolving on an executor and trust property in hands of deceased kept separate are not assets in the hands of the executors and adminis-

trators; and the statute of limitations does not run against them; *Philippi v. Philippi*, 115 U. S. 151, 29 L. ed. 336, 5 Sup. Ct. Rep. 1181, holding in Alabama even in the absence of a statute of limitation if twenty years are allowed to elapse from the time when proceedings could have been instituted for the settlement of a trust without commencement of such proceedings, and there has been no recognition within that period, of the trust as continuing and undischarged, a presumption of settlement would arise, operating as a continuing bar; *Blackwell v. Blackwell*, 33 Ala. 57, 70 Am. Dec. 556, holding executor or administrator cannot invoke statute to protect himself against claim of distributees, unless he has denied the continuance of the trust, or set up a claim in his own right; *Cartmell v. Perkins*, 2 Del. Ch. 102; *Thomas v. Brinsfield*, 7 Ga. 154,—holding trusts intended by courts of equity not to be reached or affected by statute of limitations, are those technical continuing trusts which are not cognizable at law but fall within jurisdiction of courts of chancery; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Wren v. Gayden*, 1 How. (Miss.) 365,—holding where the trust subsists, being a direct one, the statute will not be adopted in equity as a rule of decision although a concurrent remedy may exist at law; *Parmele v. McGinty*, 52 Miss. 475; *Reynolds v. Aetna L. Ins. Co.* 28 App. Div. 591, 51 N. Y. Supp. 446,—holding so long as the trust subsists the right of the cestui que trust cannot be barred by the length of time during which he has been out of possession; *Manaudas v. Mann*, 22 Or. 525, 30 Pac. 422, holding as between trustee as cestui que trust in case of an express trust, where latter seeks relief against former the statute has no application; *Mowry v. Providence*, 10 R. I. 52, as to statute of limitations as to private trusts; *Grant v. Anderson*, 1 Tex. App. Civ. Cas. (White & W.) 76, holding note given to guardian of minors for the minors not barred, although more than statutory period had elapsed since its maturity before filing suit, but statutory time had not elapsed since removal of minor disabilities and before the filing of suit; *Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; *Patton v. Overton*, 8 Humph. 192,—holding statute does not apply to an express or technical trust so long as the trust subsists, yet if the trustee openly deny the right of the cestui que trust and assumes absolute adverse ownership of trust property, the statute will attach from a time a knowledge of the denial or repudiation of the trust is brought home to the cestui que trust; *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620, holding constructive trusts barred by lapse of time.

Distinguished in *Decouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478, holding where a person takes possession of property in his own right, and is afterwards, by matter of evidence or construction changed into a trustee, lapse of time may be pleaded in bar.

#### — To bar equity of redemption.

Cited in *Morgan v. Morgan*, 10 Ga. 297; *Mathews v. Light*, 40 Me. 394; *Blethem v. Dwinal*, 35 Me. 556; *Crook v. Glenn*, 30 Md. 55; *Ayres v. Waite*, 10 Cush. 72; *McNair v. Lot*, 34 Mo. 285, 84 Am. Rep. 78,—holding actual possession of the mortgaged premises by mortgagee continued for twenty years, without any payment of interest to mortgagor, or any thing done or said to recognize the mortgage as an existing encumbrance will bar the equity of redemption; *Dexter v. Arnold*, 3 Sumn. 152, Fed. Cas. No. 3,859, holding courts of equity follow the analogies of the law, as to the limitation of the right to redeem from a mortgage; *Snavely v. Pickle*, 29 Gratt. 27; *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426,—as to equity of redemption being barred by mortgagee being in possession for twenty years.

**— In favor of possessor against owner.**

Cited in *Almy v. Wilbur*, 2 Woodb. & M. 371, Fed. Cas. No. 256, holding it does not begin to run in favor of one having possession of personal property until such possession becomes tortious; *Didier v. Davison*, 2 Sandf. Ch. 61, holding neither fraud in obtaining possession, knowledge of the possessor that his claim is wrongful as well as fraudulent, his fraudulently concealing the injury nor plaintiff's ignorance of it till after the statute, will excuse the negligence of the owner in not exhibiting his bill within the prescribed period; *Walker v. Fraser*, 7 Rich. Eq. 230, as to operation of statute between tenant for life and remainderman on one side and third person claiming adversely to both; *Stranghan v. Wright*, 4 Rand. (Va.) 493, as to whether court of equity will refuse to assist a party to assert legal title when right of entry is barred by adverse possession by removing impediments to a fair trial at law; *Adamson v. Adamson*, 7 Ont. App. Rep. 592, as to it affecting remedy and not title.

**Laches.**

Cited in *Lux v. Haggan*, 69 Cal. 255, 10 Pac. 674, holding under circumstances of case plaintiffs were not estopped from seeking equitable relief by reason of laches; *Reed v. Dingess*, 56 Fed. 171; *Landsdale v. Smith*, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; *Bowen v. Chase*, 94 U. S. 806, 24 L. ed. 184; *Piatt v. Vatlier*, 9 Pet. 405, 9 L. ed. 173; *Akins v. Hill*, 7 Ga. 573; *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369; *Lingan v. Henderson*, 1 Bland, Ch. 236; *St. Paul's Church v. Atty. Gen.* 164 Mass. 188, 41 N. E. 231; *McLean v. Barton, Harr. Ch. (Mich.)* 279; *Clark v. Potter*, 32 Ohio St. 49,—holding court of equity will not relieve against; *Epley v. Witherow*, 7 Watts, 163, holding that one who stands by and sees his property sold at sheriff's sale as property of another person without giving notice of his title, will be barred from recovering it in ejectment.

**Effect of statutes in courts of equity.**

Cited in *Patton v. M'Clure, Mart. & Y.* 332, holding courts of equity are equally bound with courts of law by statute.

**Decree against tenant in tail as binding on reversion or remainder.**

Cited in *Baylor v. Dejarnette*, 13 Gratt. 152, holding it binding although by the failure of all previous estates the estates in reversion or remainder might afterward become vacant.

**Adverse possession as affected by relations of parties.**

Cited in *Brackett v. Persons, Unknown*, 53 Me. 228, holding twenty years adverse possession of real estate under recorded deeds is a bar to maintenance of a petition for partition whatever may be the legal title of petitioners; *Lane v. Kennedy*, 13 Ohio St. 42, holding that encroachment by adjoining owners upon highway for 20 years is not necessarily adverse to public and gives owner no prescriptive rights; *Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158, holding possession by trustee cannot be adverse to cestui que trust; *Hughes v. Brown*, 88 Tenn. 578, 8 L.R.A. 480, 13 S. W. 286, as to adverse possession by trustee or tenant; *Collins v. Reid*, 6 N. S. 252, 257, holding that possession of assignor of equity of redemption is not *prima facie*, adverse to assignee.

**— Between mortgagor and mortgagee.**

Cited in *Byrd v. McDaniel*, 33 Ala. 18, holding possession of mortgagee adverse to mortgagor; *Morgan v. Morgan*, 10 Ga. 297, holding that twenty years possession of mortgaged property by mortgagee, under mortgage, will, *prima facie*, bar mortgagor's right to redeem; *Jackson ex dem. Varick v. Waldron*, 13 Wend. 178, as to adverse possession by mortgagee extinguishing claim of mortgagor; *Woodlief*

v. Wester, 136 N. C. 162, 48 S. E. 578, holding actual possession by mortgagor necessary to bar mortgagee's rights; Martin v. Jackson, 27 Pa. 504, 67 Am. Dec. 489, holding no adverse possession with consent or connivance of a mortgagor, unless so open as to be notice, can affect the mortgage; Glezen v. Haskins, 23 R. I. 601, 51 Atl. 219, holding mortgagee is not disseized by adverse possession begun after his mortgage.

**— Trustee and cestuis que trust.**

Cited in Blackett v. Ziegler, 147 Iowa, 167, 125 N. W. 874, holding that denial by trustee of rights of cestui que trust, so that his possession becomes adverse, will set statute of limitations in operation; Archibald v. Blois, 2 N. S. 307, holding that adverse possession of widow, cestui que trust, as against trustees, will enure to benefit of her children, being also cestuis que trust.

Cited in 3 Washburn, Real Prop. 6th ed. 146, on express disavowal of trust essential to trustee's obtaining title by adverse possession; 2 Washburn, Real Prop. 6th ed. 457, on receipt of profits from as equivalent of seisin, and liable to be lost by adverse possession.

**— After lawful or permissive entry.**

Cited in Pulaski County v. State, 42 Ark. 118, holding mere permissive occupation not; Zeller v. Eckert, 4 How. 289, 11 L. ed. 979, holding statute does not begin to run in favor of tenant and against the landlord until possession by tenant becomes tortious and wrongful; Spalding v. Grigg, 4 Ga. 75, holding possession of property by agreement with owner not adverse; Gladney v. Barton, 51 Miss. 216, holding entry under parol contract of sale constituted adverse entry; Chance v. Branch, 58 Tex. 490, holding if the original entry be not with the intention of claiming the premises, and possession is continued by the permission of the true owner and with the understanding between the parties that the true owner is to be regarded as the proprietor such possession is not adverse and cannot ripen into a title.

**Discharge of solicitor.**

Cited in Griffiths v. Griffiths, 12 L. J. Ch. N. S. 397, 2 Hare, 587, 7 Jur. 573, holding where a party has employed as his solicitors a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause necessary for its prosecution shall be delivered up to his new solicitor upon the usual undertaking for saving the lien of the discharged solicitor.

**— Disability to be employed against former client.**

Cited in Horsley v. Cox, L. R. 7 Eq. 461, 38 L. J. Ch. N. S. 678, 20 L. T. N. S. 473, 17 Week. Rep. 603, as to equity restraining solicitor who has intimate knowledge of case being employed on other side; Hutchins v. Hutchins, 1 Hog. 315, holding a solicitor who has been discharged by his client, cannot afterward be employed against him in the same suit; Little v. Kingswood & P. Collieries Co. 51 L. J. Ch. N. S. 498, L. R. 20 Ch. Div. 733, 47 L. T. N. S. 323, 52 L. J. Ch. N. S. 56, 31 Week. Rep. 178, as to duty of former solicitor not to divulge secrets.

Distinguished in Hutchinson v. Newark, 3 De G. & S. 727, holding court will not restrain, at the instance of administrator, a solicitor who had acted on behalf of administrator in the affairs of intestate's estate from acting as solicitor for some of next of kin in a suit for the administration of estate; Parratt v. Parratt, 17 L. J. Ch. N. S. 346, 3 De G. & S. 258, 12 Jur. 740, holding solicitor who had been consulted by executor in management of estate may act for legatee

in action against executor personally for appropriation of funds of estate; Johnson v. Marriott, 3 L. J. Exch. N. S. 40, 2 Cromp. & M. 183, 2 Dowl. P. C. 343, 4 Tyrw. 78, holding an attorney who has been discharged by his client, except for misconduct, will not be restrained from acting, in the same cause, for the opposite party unless it clearly and distinctly appear that he has obtained information in his former character which is essential to conceal, and which it would be prejudicial to cause of his former client to communicate; Bricheno v. Thorp, Jacob, 300, 23 Revised Rep. 69, holding clerk in solicitors office may, after leaving his employ, appear as solicitor against the clients of his former master; Re Holmes, 25 Week. Rep. 603, holding solicitor who was employed in forming corporation may appear for those seeking its dissolution when the information he obtained while forming same could have been obtained by any one else.

#### **Transfer of disputed right or title by person out of possession.**

Cited in Johnson v. Van Wyck, 4 App. D. C. 294, 41 L.R.A. 520; Hoyt v. Thompson, 3 Sandf. 416,—holding it invalid at common law.

#### **Jurisdiction of probate courts.**

Cited in Re Shaw, 1 Tucker, 352; Campbell v. Bruen, 1 Bradf. 224,—as to their jurisdiction as to claims of creditors.

#### **Necessary parties to suit in equity.**

Cited in Franklin Sav. Bank v. Taylor, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 854, holding all persons interested in object of suit and whose rights will be directly affected by the decree are necessary parties; McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652, holding a trustee having large powers over trust estate, and important duties to perform with respect to it is a necessary party to a suit by a stranger to defeat the trust; Lyman's Petition, 11 R. I. 157, holding that all living persons who by any contingency might be entitled to estate must be made parties in petition, under statute for sale of trust estate.

Cited in note in 8 L.R.A. (N.S.) 50, 56, on devestiture of estates of persons not in being.

#### **Joinder of persons having conflicting interest in suit.**

Cited in Sears v. Hardy, 120 Mass. 524; Mills v. Hoag, 7 Paige, 18, 31 Am. Dee. 271; Alston v. Jones, 3 Barb. Ch. 397,—holding it improper; Wing v. Angrave, 8 E. R. C. 519, 8 H. L. Cas. 183, 30 L. J. Ch. N. S. 65, on whether two persons each claiming title to be in him can join in one suit for certain property.

#### **Jurisdiction of courts of law and chancery.**

Cited in Baker v. Biddle, Baldw. 394, Fed. Cas. No. 764; Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152,—as to the jurisdiction being concurrent.

#### **Writ of right.**

Cited in Varick v. Edwards, Hoffm. Ch. 382; Williams v. Woodard, 7 Wend. 250; Bradstreet v. Clarke, 12 Wend. 602,—as to right of devisee to maintain it upon seizin of his testator.

#### **Jurisdiction of court of equity to relieve against mistake.**

Cited in Swedesboro Loan & Bldg. Asso. v. Gans, 65 N. J. Eq. 132, 55 Atl. 82, holding cases of plain mistake or misapprehension of right, though not the effect of fraud or connivance, are entitled to the interposition of a court of equity where there has been no negligence on part of applicant; Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dee. 423, holding a palpable mistake appearing upon the face of an executor's account, after final settlement and allowance may be relieved

against in equity; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; Crawford v. Bertholf, 1 N. J. Eq. 458; Dambmann v. Schulting, 75 N. Y. 55,—as to when equity will relieve against mistake.

**Necessity of knowledge of consequences of act in confirming title.**

Cited in Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847, holding that no man can be held by any act of his to confirm title, unless he is fully aware at time, not only of fact, upon which defect depends; but of consequence in point of law.

**Release in ignorance of right.**

Cited in Lumley v. Wabash R. Co. 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66; Kirchner v. New Home Sewing Mach. Co. 59 Hun, 186, 13 N. Y. Supp. 473,—holding it does not cover damages of which releasor was ignorant.

**Delivery of deed in escrow.**

Cited in Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369, holding deed delivered by grantor to third person to be by such person delivered to grantee upon the happening of some future event is an escrow which takes effect upon the second delivery and, if grantee obtains possession of it before the event happens, the grantor may avoid it on the plea of non est factum.

**Necessity of compliance with enrolment acts.**

Cited in Doe ex dem. Presby. Church v. Bain, 3 U. C. Q. B. 198, on enrollment of deeds of bargain and sale as provided by statute.

**Equitable maxims.**

Cited in McCredie v. Buxton, 31 Mich. 383, to the point that tortious act can never be foundation of equitable title; Smith v. Estes, 72 Mo. 310, on maxim he who seeks equity must do equity.

**Devolution of property on failure of testator to make distribution.**

Cited in Denson v. Autrey, 21 Ala. 205, holding if any portion of the property remain undisposed of by will the heirs at law or next of kin are entitled to it.

**Abandonment of property.**

Cited in Holmes v. Cleveland, C. & C. R. Co. 93 Fed. 100, as to right of owners of property to abandon it.

**Interest on life estate.**

Cited in Miller v. Delamater, 12 Wend. 433, holding tenant for life only bound to account for principal.

**Rule in equity for deciding conflicting interest in real property.**

Cited in Phillips v. Reid, N. F. (1897-1903) 241, to the point that in deciding as to conflicting interests in real property equity will enquire, not what property was first in possession, but under what instrument he was in possession when his right is dated in point of time, or when did the right arise and who had the prior right.

14 E. R. C. 638, GREY v. PEARSON, 6 H. L. Cas. 61, 3 Jur. N. S. 823, 26 L. J. Ch. N. S. 473, 5 Week. Rep. 454, affirming the decision of the Lord Chancellor, reported in 3 De G. M. & G. 398, 1 Week. Rep. 421.

**Construction of instruments or statute according to words used rather than conjectural intent.**

Cited in Barthel v. Scotten, 24 Can. S. C. 367, holding the intention of the parties to a deed is paramount and must govern regardless of consequences; Littig v. Hance, 81 Md. 416, 32 Atl. 343; Albert v. Albert, 68 Md. 352, 12 Atl.

11; *Calori v. Andrews*, 12 B. C. 236; *Courtney v. Canadian Development Co.* 7 B. C. 377,—as to words in one document not being sure guide to construction of same words in another; *Chase v. Walker*, 167 Mass. 293, 45 N. E. 916; *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107; *Ellis v. Throckmorton*, 52 N. J. Eq. 792, 29 Atl. 789; *Pearson's Estate*, 10 Pa. Dist. R. 189; *Wood v. Mason*, 17 R. I. 99, 20 Atl. 264; *Hatcher v. Hatcher*, 80 Va. 169; *East v. Garrett*, 84 Va. 523, 9 S. E. 1112; *Australian Boot Trade Employees Federation v. Whybrow & Co.* 11 C. L. R. (Austr.) 311; *Rogers v. Turner*, 26 N. B. 164; *Crawford v. Broddy*, 26 Can. S. C. 345; *Lawlor v. Lawlor*, 10 Can. S. C. 194; *Taylor v. Drake*, 9 B. C. 54; *Washington v. Grand Trunk R. Co.* 28 Can. S. C. 184,—holding grammatical or ordinary sense of words should be adhered to unless it would lead to some absurdity or some repugnance or inconsistency with rest of statute; *Winnipeg v. Brock*, 20 Manitoba L. Rep. 669, to the point that ordinary meaning of words of statute should be adhered to, in construing same, unless it would lead to absurdity or repugnance; *Doe ex dem. Wood v. De Forrest*, 23 N. B. 209 (dissenting opinion), on rule of construction of statutes as being that where there is no context courts should construe according to ordinary grammatical meaning of words used; *Cotting v. Boston*, 201 Mass. 97, 87 N. E. 205, to the point that grammatical and ordinary sense of words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with rest of instrument; *Thompson v. Trenton Water Power Co.* 77 N. J. L. 672, 73 Atl. 410, holding that in construing document grammatical and ordinary sense of words is adhered to unless they would lead to some absurdity, or some repugnancy or inconsistency with rest of instrument; *Nordean v. Minneapolis, St. P. & S. Ste. M. R. Co.* 148 Wis. 627, 135 N. W. 150, holding that consideration of purpose and object of statute is recognized aid to construction, in certain cases; *McFatridge v. Griffin*, 27 N. S. 421, on rules for construction of instruments; *Mills v. Dunham* [1891] 1 Ch. 576, 60 L. J. Ch. N. S. 362, 64 L. T. N. S. 712, 39 Week. Rep. 289, holding that where there is doubt between two constructions that one must be chosen which will uphold the validity of the instrument; *Ex parte Walton*, L. R. 17 Ch. Div. 746, 50 L. J. Ch. N. S. 657, 45 L. T. N. S. 1, 30 Week. Rep. 395, holding a statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention; *Spence v. Metropolitan Bd. of Works*, L. R. 22 Ch. Div. 142, 52 L. J. Ch. N. S. 249, 47 L. T. N. S. 459, 31 Week. Rep. 347, as to rule of construction of Acts of Parliament; *Caledonian R. Co. v. North British R. Co.* L. R. 6 App. Cas. 122, 29 Week. Rep. 685, holding statute should be construed according to intention of legislature; *Taylor v. St. Helen's Corp.* L. R. 6 Ch. Div. 264, 46 L. J. Ch. N. S. 857, 37 L. T. N. S. 253, 25 Week. Rep. 885, holding language should be construed according to its ordinary meaning giving the technical terms their technical meaning unless the context is such that the ordinary rules of construction which would be applied to original expressions standing alone should not be applied.

Cited in note in 2 Eng. Rul. Cas. 755, on construing ambiguous instrument most strongly against grantor.

Cited in 1 Beach Contr. 884, on construing grants favorable to grantee.

#### **— Of will.**

Cited in *Doten v. Doten*, 66 N. H. 331, 20 Atl. 387, holding testator's intention controls construction of will; *Re Griffin*, 75 Misc. 441, 135 N. Y. Supp.

518, holding that where absolute bequest of money to daughter in holographic will is accompanied by provision that on her death money is to revert to sons of testatrix in equal shares, daughter takes life estate and sons vested remainder; Barrus v. Kirkland, 8 Gray, 512, holding mode of arriving at intention of testator is not by conjecturing what testator might do, but by taking the just meaning of the words which he has used; Serrill's Estate, 16 Phila. 409, 41 Phila. Leg. Int. 489, 15 W. N. C. 470, holding while it is true that general words are restrained in their interpretation when necessary to effectuate the manifest purpose of the parties, the rule has no application in cases where words must be stricken out or deprived of their ordinary and obvious meaning in order to carry out an assumed purpose; King v. Evans, 24 Can. S. C. 356, holding every word which testator has used is to be given effect and nothing is to be rejected if it is in any way possible to reconcile and give a consistent meaning to the terms in which testator has expressed himself; Burgess v. Burrows, 21 U. C. C. P. 426, holding when testator's intention is clear, but he fails in words to provide for the precise count which happens, the court may supply the words; Jordan v. Dunn, 13 Ont. Rep. 267, as to changing "and" into "or" to favor the vesting of the legacy; Leach v. Jay, L. R. 6 Ch. Div. 496, holding word "seized" in a will must be construed according to its technical meaning; Allgood v. Blake, L. R. 8 Exch. 160, holding intention of testator must be gathered from whole will; Leonard v. Leonard, 1 N. B. Eq. Rep. 576; Surtees v. Surtees, L. R. 12 Eq. 400, 25 L. T. N. S. 288, 19 Week. Rep. 1043,—holding there is no good reason for trying to modify the frame of a will by reason of what should have been the intention of the testator; Brantford Electric & Operating Co. v. Brantford Starch Works, 30 Ont. L. Rep. 118 (dissenting opinion); Bell v. McKinsey, 3 U. C. Err. & App. 9 (dissenting opinion); Travers v. Roman Catholic Bishop, 2 N. B. Eq. Rep. 372; Cook v. Noble, 5 Ont. Rep. 43; Lawrence v. Ketchum, 28 U. C. C. P. 406; Forsyth v. Galt, 22 U. C. C. P. 115; Forsyth v. Galt, 21 U. C. C. P. 408; Reed v. Braithwaite, L. R. 11 Eq. 514, 40 L. J. Ch. N. S. 355, 24 L. T. N. S. 351, 19 Week. Rep. 697; Re Sander, L. R. 1 Eq. 675, 12 Jur. N. S. 351, 14 Week. Rep. 576; Waring v. Currey, 22 Week. Rep. 150,—as to rule as to construction of wills; O'Day v. Black, 31 U. C. Q. B. 38; Farrell v. Farrell, 26 U. C. Q. B. 652; Rhodes v. Rhodes, L. R. 7 App. Cas. 192, 51 L. J. P. C. N. S. 53, 46 L. T. N. S. 463, 30 Week. Rep. 709; Lowther v. Bentinek, L. R. 19 Eq. 166, 44 L. J. Ch. N. S. 197, 31 L. T. N. S. 719, 23 Week. Rep. 156,—holding they should be construed according to their literal import unless there is something in the subject or context which shows that that cannot be the meaning of the words.

Cited in note in 25 L.R.A.(N.S.) 1154, 1155, 1158, 1164, 1167, on time to which contingency of death of legatee or devisee without child or issue, upon which gift conditioned is referable.

Distinguished in Gilmor's Estate, 154 Pa. 523, 35 Am. St. Rep. 855, 26 Atl. 614, 32 W. N. C. 272, holding "or" will not be held equivalent to "and" in construing will unless context shows that "or" has been put for "and" by mistake.

#### —Extrinsic matters.

Cited in Bartholomew v. Muzzy, 61 Conn. 387, 29 Am. St. Rep. 206, 23 Atl. 604; Williston v. Lawson, 22 N. S. 521,—holding extrinsic evidence of any material fact which will enable the court to ascertain the nature and qualities of subject matter of instrument should be received.

14 E. R. C. 656, MYERS v. SARL, 3 El. & El. 306, 7 Jur. N. S. 97, 30 L. J. Q. B. N. S. 9, 9 Week. Rep. 96.

#### **Construction of instruments.**

Cited in Woolf v. Allen, 4 Terr. L. R. 431, holding that same expression used in different parts of same document should ordinarily be interpreted in same manner.

#### **Admissibility of evidence of usage to explain a written contract.**

Cited in Hearne v. New England Mut. M. Ins. Co. 3 Cliff. 318, Fed. Cas. No. 6,301, holding that evidence as to the usage of trade is admissible to prove that words used are employed in a peculiar sense in the particular trade to which the contract relates, or to annex incidents to the contract in matters upon which the contract is silent; Swift's Iron & Steel Works v. Dewey, 37 Ohio St. 242, holding that the usage must not be inconsistent with the words of the agreement nor must it be unreasonable; McClusky v. Klosterman, 20 Or. 108, 10 L.R.A. 785, 25 Pac. 366, holding that evidence of usage to explain contract is admissible when the usages are included by mutual understanding as of course, in the contract; Troop v. Union Ins. Co. 32 N. B. 135, holding that where words of contract are plain and unambiguous, evidence of usage to show peculiar meaning is not admissible; Hayes v. Nesbitt, 25 U. C. C. P. 101, on the admissibility of evidence of usage and custom to explain a written contract.

Cited in notes in 24 L. ed. U. S. 675, on parol evidence of previous negotiations to affect a written contract; 11 Eng. Rul. Cas. 224, on parol evidence to contradict written instrument; 6 Eng. Rul. Cas. 170, on admissibility of parol evidence to explain customary, special, or technical meaning of words; 15 E. R. C. 555, on effect of custom as to tenant's rights in waygoing crop.

Distinguished in Mason v. Hartford F. Ins. Co. 29 U. C. Q. B. 585, holding that where the condition provides specifically for the thing, parol evidence of usage or custom to explain it, is inadmissible.

#### **Specifications as a part of a building contract.**

Cited in Gooch v. Snarr, 34 U. C. Q. B. 616, holding that specifications were an essential part of the contract to do all the work included in them, and they must be signed or contract is incomplete.

14 E. R. C. 674, ROBERTS v. BRETT, 11 H. L. Cas. 337, 11 Jur. N. S. 377, 34 L. J. C. P. N. S. 241, 12 L. T. N. S. 286, 13 Week. Rep. 587.

#### **Intention of the parties as governing the interpretation of a contract.**

Cited in Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906; McDonald v. Murray, 11 Ont. App. Rep. 101,—on the intention of the parties as governing the interpretation of contracts.

Cited in 1 Beach, Contr. 869, on giving words their ordinary meaning in construing contract.

#### **— Conditions precedent.**

Cited in Post v. Bernheimer, 31 Hun. 247; Ketchum v. Belding, 58 App. Div. 295, 68 N. Y. Supp. 946,—holding that what is a condition precedent depends upon the intention of the parties to be deduced from the whole instrument; Fairchild Co. v. Rustin, 17 Manitoba L. Rep. 194 (dissenting opinion), on the necessity of a performance of all conditions precedent before recovery on contract.

Distinguished in McDonald v. Murray, 2 Ont. Rep. 573, holding that a tender of conveyance was not a condition precedent to the recovery of an in-

stalment of the purchase money, where the payment was not to be an act concurrent with the passing of title.

#### **Meaning of word, forthwith.**

Cited in *Measures v. McFadyen*, 11 C. L. R. (Austr.) 723; *Cohen v. Silverman*, 4 App. Div. 503, 40 N. Y. Supp. 8,—for the meaning of the word "forthwith;" *Baker v. Smelser*, 88 Tex. 26, 33 L.R.A. 163, 29 S. W. 377, holding that "forthwith" as used in the statute, means with all reasonable diligence and dispatch; *Hudson v. Hill*, 43 L. J. C. P. N. S, 273, 30 L. T. N. S. 555, 2 Asp. Mar. L. Cas. 278, holding that "forthwith" in a charter party means as quickly as possible, unless prevented by excepted perils.

Cited in 2 *Mechem, Sales*, 976, on time for delivery where time is agreed upon; *Benjamin, Sales*, 5th ed. 687, on construction for delivery of goods sold "forthwith;" 1 *Beach, Contr.* 769, on construction of words "until," "by," "forthwith," and "immediate."

14 E. R. C. 691, *CHAD v. TILSED*, 2 Brod. & B. 403, 5 J. B. Moore, 185, 23 Revised Rep. 477.

#### **Evidence of long usage to explain the extent of grant.**

Cited in *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132, on the acquisition of title by prescription as against the state; *Price v. Lawson*, 74 Md. 499, 22 Atl. 206, holding that evidence that water of stream was used for many years for purpose of distilling whiskey and that it was pure water always, was admissible to prove prescriptive right to use pure water of stream for distilling purposes; *Hull v. Scott*, Rap. Jud. Quebec, 24 S. C. 59, on the conduct of public authorities as evidence determining the extent of a grant from the crown; *Le Procureur General v. Fraser*, Rap. Jud. Quebec, 25 S. C. 104, on long usage without protest from Crown as determining the meaning and extent of the original grant from the crown; *Hurdman v. Thompson*, Rap. Jud. Quebec, 4 B. R. 409, holding that long usage by a subject under constant view of Crown officials, and the repeated formal recognition by the Crown of the assumed right of a patentee under his grant are controlling in interpreting the ambiguous words of such a patent.

Cited in note in 15 E. R. C. 556, on custom as affecting interpretation of instruments.

#### **Rights of public in and along navigable streams or waters.**

Cited in *Leverich v. Mobile*, 110 Fed. 170, holding that owner of bank of navigable river will not be permitted to make any changes that may be deemed nuisance instead of benefit to public; *Parker v. Elliott*, 1 U. C. C. P. 470, holding that no common law right exists to public to use beach above highwater mark for purpose of fishing, when beach has been conveyed by Crown to subject.

Cited in notes in 45 L.R.A. 236, on title to land between high and low water mark; 23 Eng. Rul. Cas. 734, on prescriptive right of crown to foreshore.

Cited in 1 *Farnham, Waters*, 212, on title to shore; 1 *Farnham, Waters*, 190, on title to bed of tidal rivers; 1 *Farnham, Waters*, 196, on right of Crown to grant shore or land under water to private individuals; 1 *Farnham, Waters*, 277, on title to islands.

#### **Title by prescription.**

Cited in *Brookhaven v. Strong*, 60 N. Y. 56, holding that possession and user, under and from time of grant, and successful maintenance of right when disputed, if not sufficient to give title by prescription, gives claimant benefit of

every legitimate presumption to supply defects; *Galveston v. Menard*, 23 Tex. 349, to the point that exclusive possession of tide land for more than forty years gave title by prescription; *Reg. v. Meyers*, 3 U. C. C. P. 305, holding that where public have had use of stream for great length of time for boats of certain size such stream is a public river.

Cited in 1 Dillon, *Mun. Corp.* 5th ed. 456, on usage and prescription as affecting municipal powers and their constructions.

#### — Highways.

Cited in *Webber v. Chapman*, 42 N. H. 326, 80 Am. Dec. 111, holding that if highway be inclosed by individual, and occupied by him adversely, under claim of right for more than 20 years, he will acquire prescriptive right to land as against public.

Cited in note in 26 L.R.A. 839, on discontinuance or vacation of highway by acts of authorities.

#### **Legalization of nuisance by lapse of time.**

Cited in *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513, holding that no right will be acquired against state by obstruction of public fishway, though continued for more than twenty years, under claim of right, if such obstruction originated without right; *Cross v. Morristown*, 18 N. J. Eq. 305, holding that encroachment upon street or public highway cannot be legalized by mere lapse of time.

14 E. R. C. 699, *HARE v. HORTON*, 5 Barn. & Ad. 715, 3 L. J. K. B. N. S. 41, 2 Nev. & M. 428.

#### **Restriction of general terms used in instrument by special recitals.**

Cited in *Miller v. Wagenhauser*, 18 Mo. App. 11, holding that general terms in a written instrument are limited by special recitals used in the same connection.

#### **Expression of one thing in contract as exclusion of others.**

Cited in *Warden v. Balch*, 59 N. H. 468, holding that the express mention of the right to take water from one source, negatives the right to take water from any other source; *Denton v. Leddell*, 23 N. J. Eq. 64, holding that a grant of land subject to a right of flowage to a certain mark, implied that the land could not be overflowed beyond that mark; *McGrath v. Vanaman*, 53 N. J. Eq. 459, 32 Atl. 686, holding that an agent having authority to sell standing timber has no implied authority to sell and take a note of the purchaser; *Hall v. Samson*, 19 How. Pr. 481, holding that chattel mortgage which provided that in certain cases the mortgagee might take possession, implied that at other times the mortgagor was to have possession; *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228, holding that condition in a policy exempting the company from liability for loss by explosion of steam boiler, raised the inference that loss from other explosions was not excepted; *Williamsburgh City F. Ins. Co. v. Williard*, 21 L.R.A. (N.S.) 103, 90 C. C. A. 392, 164 Fed. 404, holding that a policy which provided that the company should not be liable for any loss occasioned directly or indirectly resulting from invasion or any loss from earthquake, etc. the words, directly or indirectly, did not apply to earthquakes; *Keewatin Power Co. v. Kenora*, 13 Ont. L. Rep. 237, holding that an express grant of the water power in the west branch of a river negatives the right in the east branch; *Hobbs v. Guardian F. Ins. Co.* 7 Ont. Rep. 634 (dissenting opinion) on the provision for one thing in a contract as raising inference that similar provisions were intentionally omitted.

Cited in 1 Elliott, Railr. 2d ed. 680, on specification of certain after-acquired articles in railroad mortgage as excluding all others.

Distinguished in Raymond v. Clark, 46 Conn. 129, holding that a mortgage on certain named railroad property followed by a general clause of "all property," included office furniture though not named; Leonard v. Stickney, 131 Mass. 541, holding that the enumeration of certain things in a deed, that would not pass by the deed, did not pass personal property of others not enumerated.

**— In statute.**

Cited in Tucker v. Alexandroff, 183 U. S. 424, 46 L. ed. 270, 22 Sup. Ct. Rep. 195, to the point that where statute gives certain remedy for usurious interest paid, that remedy is exclusive.

**— As overcoming legal implication as to inclusions.**

Cited in Standard Harrow Co. v. Simmons, 86 Hun, 309, 33 N. Y. Supp. 486, holding that the expression of one thing in a contract implies the exclusion of others not expressed, though the law would have implied them all if none had been mentioned.

**What constitutes fixtures.**

Cited in note in 1 B. R. C. 987, on heating apparatus as fixture.

**Title to fixtures as passing to the mortgagee under mortgage of land.**

Cited in Walker v. Sherman, 20 Wend. 636, on the fixtures as passing by a conveyance of the freehold; Stevens v. Barfoot, 13 Ont. App. Rep. 366, on a mortgage of land as passing title of fixture to the mortgagee; Anderson v. McEwen, 9 U. C. C. P. 176, on the mortgagee's right to the fixtures after default in the mortgage.

**Right of tenant to remove fixtures.**

Cited in Breese v. Bange, 2 E. D. Smith, 474, holding that assignment of leasehold interest carries with it unexpired term and necessarily includes all erections upon land, unless it is apparent that such was not intention of parties; Sudbury v. Jones, 8 Cush. 184, on the right of a tenant to remove trade fixtures.

**Possession of deed by grantor as prima facie evidence of its delivery.**

Cited in Doe ex dem. Chiverie v. Knight, 1 Has. & War. (Pr. Edw. Isl.) 448; Cogswell v. O'Connor, 11 N. S. 287,—on the possession of a deed by the grantor as prima facie evidence of their delivery.

Cited in note in 8 Eng. Rul. Cas. 617, on possession of deed by grantee as prima facie evidence of delivery.

Distinguished in Cogswell v. O'Connor, 13 N. S. 513, holding that where the deeds were delivered in escrow, their possession by the grantor was not prima facie evidence of delivery.

14 E. R. C. 710, LINE v. STEPHENSON, 1 Arnold, 385, 5 Bing. N. C. 183, 7 Scott, 69, affirming the decision of the Court of Common Pleas reported in 4 Bing. N. C. 678, 7 L. J. C. P. N. S. 263, 6 Scott, 447.

**Express mention of one thing as implying the exclusion of another.**

Cited in Pray v. Great Falls Mfg. Co. 38 N. H. 442, holding that the express mention of one thing in a grant implies the exclusion of another; Hall v. Samson, 19 How. Pr. 481, holding that if some out of certain requisites, are expressly named, in instruments, inference is stronger that those omitted are intended to be excluded, than if none at all had been mentioned.

Cited in 3 Washburn, Real Prop. 6th ed. 457, on express covenant in deed superseding implied one on same subject matter.

Distinguished in *Woods v. Hare*, 5 Legal Gaz. 397, holding that there is underlying the whole system of American Government the principle of acknowledged right in the people to change their constitution, except where specially prohibited in the constitution itself, in all cases and at all times whether there is a way provided in the constitutions or not, by the interposition of the legislature, and the calling of a convention.

**— Express and implied covenants.**

Cited in *Thornton, Oil & Gas* 2d ed. 308, on nonliability for rent under oil and gas lease after eviction; 2 *Underhill, Land. & T.* 698, on implied covenant for quiet enjoyment arising only in absence of express covenant.

The decision of the Court of Common Pleas was cited in *Pernette v. Clinch*, 26 N. S. 410 (dissenting opinion), on existence of implied covenant for perpetual renewal of lease; *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836, 63 L. J. Q. B. N. S. 661, 9 Reports, 819, 71 L. T. N. S. 362, 42 Week. Rep. 626, holding that an express covenant for quiet possession excludes an implied one.

**Covenant for quiet possession as implied from use of word demise in a lease.**

Cited in *Davis v. Pitchers*, 24 U. C. C. P. 516, holding that lessee evicted by title paramount to lessor's, could not recover under an implied covenant for quiet enjoyment contained in the word demise, as it is controlled by the express covenant for quiet enjoyment; *Mostyn v. West Mostyn Coal Co.* L. R. 1 C. P. Div. 145, 45 L. J. C. P. N. S. 401, 34 L. T. N. S. 325, 24 Week. Rep. 401, holding that where the lease contains no express covenants for title or for quiet possession, they may be implied from the use of the word, demise; *Lanigan v. Kille*, 97 Pa. 120, 9 W. N. C. 481, 38 Phila. Leg. Int. 300, on the word demise as implying a covenant for quiet enjoyment; *Baynes v. Lloyd*, 15 E. R. C. 752, 59 J. P. 710, 64 L. J. Q. B. N. S. 787, 73 L. T. N. S. 250, [1895] 2 Q. B. 610, 14 Week. Rep. 328, on the word demise as implying the existence of covenants for quiet possession and for title; *Budd-Scott v. Daniell* [1902] 2 K. B. 351, 71 L. J. K. B. N. S. 706, 87 L. T. N. S. 392, 18 Times L. R. 675, holding that an undertaking for quiet enjoyment is to be implied from the mere relation of landlord and tenant under a lease for years.

**Right of action for breach of covenant of quiet enjoyment.**

Cited in *Schnare v. Zwicker*, 31 N. S. 177, holding that disturbance of possession by one other than covenantor in covenant for quiet enjoyment or his privies, does not give rise to action for breach of covenant.

14 E. R. C. 717, *ROOKE v. KENSINGTON*, 2 Kay & J. 753, 25 L. J. Ch. N. S. 795, 4 Week. Rep. 829, 2 Jur. N. S. 755.

**General words in an instrument as controlled by recitals.**

Cited in *St. Paul F. & M. Ins. Co. v. Penman*, 81 C. C. A. 151, 151 Fed. 961, holding that general words following enumeration of particulars are to have their generality limited by reference to preceding particular enumeration; *Sutton v. Armstrong*, 32 U. C. C. P. 11, on clear words of conveyance in the operative part of a deed as being cut down by recital; *Jenner v. Jenner*, L. R. 1 Eq. 361, 35 L. J. Ch. N. S. 329, 12 Jur. N. S. 138, 14 Week. Rep. 305, L. R. 3 Eq. 91, 15 Week. Rep. 51, holding that general words conveying all the lands in the County of York, were limited by a recital that the certain specified estates thereafter mentioned and intended to be conveyed; *Danby v. Coutts*, 14 E. R. C. 769, L. R. 29 Ch. Div. 500, 54 L. J. Ch. N. S. 577, 52 L. T. N. S. 401, 33 Week. Rep. 559, holding

that the general words in a power of attorney were controlled by a recital that the party was going abroad and he desired to appoint attorneys to act during his absence, so as to limit the time of the duration of the power; *Crompton v. Jarratt*, L. R. 30 Ch. Div. 298, 54 L. J. Ch. N. S. 1109, 53 L. T. N. S. 603, 33 Week. Rep. 913, holding that general words, although introduced into a deed to carry things omitted by mistake, apply *prima facie* only to things of the same nature with those specifically enumerated; *Early v. Rathbone*, 57 L. J. Ch. N. S. 652, 58 L. T. N. S. 517, on general words in a deed being limited by special description.

**Title to lands not mentioned in deed.**

Cited in *Macdonald v. Georgian Bay Lumber Co.* 2 Ont. App. Rep. 36 (reversing 24 Grant Ch. (U. C.) 356), the grant "of all lands in" a place as passing title to the trustees.

**Jurisdiction of court of chancery to make declarations of right without relief.**

Cited in *O'Reilly v. Mutual L. Ins. Co.* 2 Abb. Pr. N. S. 167, holding that no action will lie to declare an executory contract to be valid and subsisting where no relief can be given as to the substance of the contract; *Heanley v. Wetmore*, 15 R. I. 386, 6 Atl. 777; *Purdy v. Porter*, 38 N. D. 465,—holding that the jurisdiction to make declarations of right is dependent on the right to ask for consequential relief; *Brooks v. Conley*, 8 Ont. Rep. 549, holding that there is no jurisdiction to declare rights before a party interested has sustained damages; *Murphy v. Murphy*, 20 Grant, Ch. (U. C.) 575, holding that the court may make a declaration of right without granting consequential relief where the plaintiff might have had the relief had he asked for it; *Calvert v. Burnham*, 6 Ont. App. Rep. 620, holding same but only in such cases; *Macdonald v. McCall*, 12 Ont. App. Rep. 593; *Bradley v. Barber*, 30 Ont. Rep. 443; *Scott v. Scott*, 6 Grant, Ch. (U. C.) 366; *Keefer v. McKay*, 29 Grant, Ch. (U. C.) 162,—on the jurisdiction of chancery to make declarations of right without granting consequential relief; *Barraclough v. Brown* [1897] A. C. 615, 66 L. J. Q. B. N. S. 672, 76 L. T. N. S. 797, 8 Asp. Mar. L. Cas. 290, 2 Com. Cas. 249, on the right to a declaration of right where not entitled to consequential relief; *Cox v. Barker*, L. R. 3 Ch. Div. 359, 35 L. T. N. S. 635; *Kathama Natchiar v. Dorasinga Tever*, L. R. 2 Ind. App. 169; *Sree Narain Mitter v. Sreemutty Kishen*, etc., L. R. Ind. App. Supp. 149,—holding that a court can not make a decree declaratory of right unless the plaintiff would be entitled to consequential relief, if he asked for it.

**Reformation of instruments.**

Cited in *Hearne v. New England Mut. Ins. Co.* 20 Wall. 488, 22 L. ed. 395, 7 Phila. Leg. Gaz. 57, holding that in order to have a written contract reformed for mistake, the mistake must be mutual and common to both parties so that both do what neither intended; *Harvey v. United States*, 13 Ct. Cl. 322; *Hope v. Bourland*, 21 Okla. 864, 98 Pae. 580; *Banks v. Wilson, Russell (N. S.)* 210,—on the reformation of a written instrument by a court of equity; *Owen v. Tulsa*, 27 Okla. 264, 111 Pae. 320, holding that mistake must be mutual and common to both parties in order to authorize equity court to decree reformation; *Clark v. Girdwood*, L. R. 7 Ch. Div. 9, 47 L. J. Ch. N. S. 116, 37 L. T. N. S. 614, 26 Week. Rep. 90, holding that where the marriage settlement was prepared by the intended husband and contrary to the intention of the wife, the court would rectify it.

**Sufficiency of description of land in conveyance for benefit of creditors.**

Cited in McDonald v. Georgian Bay Lumber Co. 24 Grant. Ch. (U. C.) 356, holding that conveyance for benefit of creditors of all "estate and effects" was sufficient to give title to land in foreign country.

**How intention of parties to contract is to be ascertained.**

Cited in Reinhard, Ag. 163, as to how intention of parties to contract of agency is to be ascertained.

**14 E. R. C. 724, GLENORCHY v. BOSVILLE, Cas. Talb. 3, 1 White & T. Lead. Cas. in Eq. 1.**

**Directions to a trustee to convey as creating an executory trust.**

Cited in Cushing v. Blake, 30 N. J. Eq. 689, holding that a mere direction to a trustee to convey will convert a trust into an executory trust; Tillinghast v. Coggeshall, 7 R. I. 383; Hayes v. Goode, 7 Leigh, 452,—on the distinction between executed and executory trusts; Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505, on there being a substantial difference between an executed and an executory trust.

**Meaning of "heirs," "issue" and like in executory trusts to convey.**

Cited in Edmondson v. Dyson, 2 Ga. 307, holding that when property is willed to A in trust for use of B for latter's life, with instructions to trustee, to convey to whomsoever he shall by will appoint, and if he dies intestate then to convey property to heir's at law of B and B dies intestate, heirs of B take as purchasers; Berry v. Williamson, 11 B. Mon. 245, holding that where a testator gives instructions merely for making conveyances in trust by the chancellor, a court of equity will follow the instructions and the rule in Shelley's Case will not apply; Wood v. Burnham, 6 Paige, 513, holding that the rule in Shelley's Case is not applicable to the case of an executory trust.

Cited in note in 29 L.R.A.(N.S.) 1140, on rule in Shelley's case.

**When a trust is executed.**

Cited in Ferris v. Ferris, 9 Ont. Rep. 324; Adamson v. Adamson, 17 Ont. Rep. 407,—to the point that trust is said to be executed when no act is necessary to be done to give effect to it, the limitation being originally complete.

Cited in note in 24 Eng. Rul. Cas. 161, on what is necessary to give effect to executory settlement.

**Construction of executed trust by court of equity.**

Cited in Young v. Kinnebrew, 36 Atl. 97, holding that in cases of executed trusts, court of equity will construe limitations in same manner as similar legal limitations.

Cited in 2 Washburn, Real Prop. 6th ed. 451, on mode of construing declaration of trust.

**Courts of equity as bound by rules of law.**

Cited in Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238, holding that court of equity is as much bound by positive rules and general maxims concerning property as court of law; Price v. Sisson, 13 N. J. Eq. 168, holding that in construing limitations of trusts courts of equity adopt the rules of law, applicable to legal estates; Porter v. Cocke, Peck (Tenn.) 30, holding that a court of equity will follow a statute, though not made specifically applicable to it, unless it is such as the equity principles will qualify.

14 E. R. C. 737, HALL v. CAZENOVE, 4 East, 477, 7 Revised Rep. 611, 1 Smith, 272.

**What constitutes a condition precedent.**

Cited in Gray v. Bowen, 10 Bosw. 67, holding that stipulation requiring party to procure judgment to be entered by a fixed day, will not be condition precedent to giving of bond, unless entering of judgment was expressly made to depend on that act, and compromise agreement to secure debt.

Cited in 1 Beach, Contr. 277, on physical impossibility known to the parties at the time of contracting as not being a condition precedent and as excusing from performance.

**— Conditions precedent in form but calling for time past.**

Cited in Lomax v. Smyth, 50 Iowa, 223, holding that provisions in a note for payment at a time which has passed, because the note was dated back, must be eliminated because of impossibility of performance; Leonard v. Wall, 5 U. C. C. P. 9, holding that where a contract contains a condition precedent to be performed before time of execution of contract, effect shall be given to that part of the contract which remained prospective when contract was concluded.

Cited in Hollingsworth, Contr. 270, on invalidity of contract known by both parties to be impossible of performance because time had passed.

**Performance of conditions precedent before recovery on a contract.**

Cited in Dakin v. Williams, 11 Wend. 67, holding that there must be an averment of a performance of all conditions precedent, before a recovery can be had on a contract.

**Nugatory and nonsensical constructions.**

Cited in Teall v. Van Wyck, 10 Barb. 376, holding that where the meaning of the words of a bond if literally construed would be nonsense, it must be construed with reference to the intention of the parties, and reject the insensible words.

**Admissibility of parol evidence to explain written contract.**

Referred to as a leading case in Young v. Schon, 53 W. Va. 127, 62 L.R.A. 499, 97 A. S. R. 970, 44 S. E. 136, holding that parol evidence is admissible to show the relation of the indorsers upon a non-negotiable note, to the one who asserts liability against them on the note.

Cited in Hunter v. Marlboro, 2 Woodb. & M. 168, Fed. Cas. No. 6,908, on the proving of a resulting trust by parol; Kenner v. Their Creditors, 8 Mart. N. S. 36, holding that if acceptance is not dated, parol evidence is admissible to show on what day it was made.

**— To prove date of delivery of written instrument.**

Cited in Good v. Martin, 95 U. S. 90, 24 L. ed. 341, 34 Phila. Leg. Int. 419, holding that parol evidence is admissible to show the date of the delivery of a note; District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680 (affirming 15 App. D. C. 198), holding that where the contract was to be performed within a certain number of days from its date, it may be shown by parol that it was executed and delivered at a day subsequent to its date; Pascault v. Cochran, 34 Fed. 358, holding that where a mortgage was given as additional security for the purchase of land, the true date of the purchase money mortgage and deed may be shown by parol; Cummings v. McCullough, 5 Ala. 324, on the proof of the true date of a deed by parol evidence; Merrill v. Sybert, 65 Ark. 51, 44 S. W. 462, holding that parol evidence is admissible to prove that a certificate of acknowl-

edgment was executed on the day other than that appearing as its date; *District of Columbia v. Camden Iron Works*, 15 App. D. C. 198, holding that parol evidence is admissible to show that contract executed by Commissioners of District of Columbia, was in fact executed and delivered at date subsequent to that stated in contract; *Jackson ex dem. Griswold v. Bard*, 4 Johns. 230, 4 Am. Dec. 267, holding that a party is not estopped from showing the true date of a deed; *Man v. Drexel*, 2 Pa. St. 202, on same point; *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289, holding that the true date of a mortgage may be shown by parol; *Battles v. Fobes*, 2 Met. 93, holding that the date of the delivery of a deed may be shown by parol evidence; *Young v. Sehon*, 53 W. Va. 127, 62 L.R.A. 499, 97 Am. St. Rep. 970, 44 S. E. 136, holding that between parties parol evidence is admissible to show the time and circumstances of endorsements on a note; *Reffell v. Reffell*, L. R. 1 Prob. & Div. 139, 35 L. J. Prob. N. S. 121, 12 Jur. N. S. 910, 14 L. T. N. S. 705, 14 Week. Rep. 647, holding that parol evidence is admissible to prove that a will was executed on a date other than that which appears on the face of it.

#### **To prove facts or date of execution.**

Cited in *State v. Wallahan*, Tappan (Ohio) 48, holding that true time of executing bond, may be proven by parol.

Cited in 2 Page, Contr. 1862, on parol evidence as to facts of execution of contract.

#### **Deed as taking effect from time of delivery.**

Cited in *Jackson ex dem. Russell v. Rowland*, 6 Wend. 666, 22 Am. Dec. 577, holding that a deed takes effect from the time of its delivery, if in escrow, by the party to whom given to deliver.

#### **Pleading date of a deed.**

Cited in *Remington v. Henry*, 6 Blackf. 63, holding that where a written instrument is pleaded as made on a certain day, one bearing a different date may be given in evidence; *Jackson ex dem. Sword v. Mumford*, 9 Cow. 254, holding that a deed executed on a particular day may be pleaded as made on any other day.

#### **Construction of statutes.**

Cited in *Gardiner v. Gardiner*, 2 Upper Can. Jur. 554 (dissenting opinion), on construction of statutes.

#### **14 E. R. C. 744, REX v. SCAMMONDEN, 2 New Sess. Cas. 189, 1 Revised Rep. 752, 3 T. R. 474.**

#### **Admissibility of parol evidence to show true consideration of a deed.**

Cited in *Quimby v. Stebbins*, 55 N. H. 420; *Jack v. Dougherty*, 3 Watts, 151; *Curry v. Lyles*, 2 Hill, L. 404; *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519; *McDonald v. Clarke*, 30 U. C. Q. B. 307,—holding that the true consideration of a deed may be shown by parol; *Chancellor v. Windham*, 1 Rich. L. 161, 42 Am. Dec. 411; *Butler v. Church*, 18 Grant. Ch. (U. C.) 190,—on the same point; *Graham v. Loekhart*, 8 Ala. 9, holding that where notes and deeds of trust are mentioned in a deed as the consideration thereof, it may be shown by parol what these were; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661, on the right of the parties to a deed to show a consideration different from that expressed; *Tyler v. Carlton*, 7 Me. 175, 20 Am. Dec. 357, holding that parol evidence of additional consideration not expressed was admissible; *Powell v. Monson & B. Mfg. Co.* 3 Mason, 347, Fed. Cas. No. 11,356, holding that parties to a

deed are estopped to deny the consideration stated in it, but other auxiliary considerations may be proved; *Quarles v. Quarles*, 4 Mass. 680, holding that where one consideration is expressed in a deed, any other consideration consistent with it may be proved by parol; *Wilkinson v. Scott*, 17 Mass. 249, holding that a party is not bound by the consideration expressed in the deed if he can show it to be otherwise; *Davenport v. Mason*, 15 Mass. 85; *Hartley v. M'Anulty*, 4 Yates, 95,—holding that where no consideration is mentioned in a deed, the consideration may be proved by parol; *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103, holding that the consideration clause of a deed is open to explanation by parol; *Jacobs v. Insurance Co.* 52 S. C. 117, holding that consideration for deed may be shown by extrinsic evidence; *Upper Canada College v. Boulton*, 2 U. C. C. P. 326, holding that a consideration on which a covenant was founded but which was not expressed in a deed, could be shown by parol; *Kitchen v. Boon*, 24 Grant, Ch. (U. C.) 195, holding that parol agreement to refund excess paid for land, purchased at certain price per acre, if acreage was less than that stated, may be shown in action for such excess.

Cited in note in 20 L.R.A. 113, on parol evidence as to consideration of deed.

Distinguished in *Reading v. Weston*, 8 Conn. 117, 20 Am. Dec. 97, holding parol evidence inadmissible to show that an absolute deed of land was intended as a security for debt; *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263, holding party not estopped by a recital that money had been paid, to show that none has; *Towsley v. Smith*, 12 U. C. Q. B. 555, holding that parol evidence was not admissible to show that the transaction out of which the deed arose, was an exchange.

Doubted in *Martin v. Gordon*, 24 Ga. 533 (dissenting opinion), on the admissibility of parol evidence to show actual consideration of deed.

#### **— To disprove or impeach a deed.**

Cited in *Andrews v. Jones*, 10 Ala. 460, holding that the principal can show by parol that the land purchased by the agent in his own name was the land of the principal, and assert his title; *Johnson v. Blackman*, 11 Conn. 342; *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. 852,—holding that a stranger may contradict a deed by parol, to prevent its fraudulent operation of his interests; *McKee v. St. Louis*, 17 Mo. 184, holding that, although as between parties deed may be conclusive, yet when third persons have interest, they are not precluded from inquiring into real facts; *Quaker Soc. v. Dickenson*, 12 N. C. (1 Dev. L.) 189, holding that a party may show by parol the unlawful purposes for which a deed was given, in contradiction of the deed.

Cited in notes in 11 E. R. C. 222, on parol evidence to contradict written instrument; 22 E. R. C. 864, on parol evidence as to contract sought to be specifically enforced.

#### **— Other writings importing consideration.**

Cited in *Robinson v. Jefferson*, 1 Del. Ch. 244, holding that the consideration of two bills under seal may be shown by parol; *Rice v. Hancock*, Harp. L. 393, holding that the true consideration of a bill of sale may be shown by parol.

Distinguished in *Hall v. Rand*, 8 Conn. 560, holding parol evidence inadmissible to affect the construction of a written instrument, by circumstances under which it was given.

#### **Consideration for covenant to stand seized to uses.**

Cited in *Underwood v. Campbell*, 14 N. H. 393; *Cook v. Brown*, 34 N. H. 460,—holding that a conveyance to stand seized to uses requires a consideration of blood or marriage.

**Pleading other consideration as not contradiction of instrument.**

Cited in *McIntyre v. Kingston*, 4 U. C. Q. B. 471, holding that averment of some other consideration for making of lease than rents mentioned in lease, is not necessarily a contradiction of lease.

14 E. R. C. 746, *CLIFFORD v. TURRILL*, 9 Jur. 633, affirming the decision of the Vice Chancellor, reported in 14 L. J. Ch. N. S. 390, 6 Jur. 5, 1 Younge & C. Ch. Cas. 138.

**Proof of true consideration by parol evidence.**

Cited in *Busch v. Hart*, 62 Ark. 330, 35 S. W. 534, holding that the consideration of a contract to furnish materials and labor, if not within the statute of frauds, may be shown by parol, if it does not vary the contract; *Nedvidek v. Meyer*, 46 Mo. 600, holding same in case of a bill of sale; *Cleveland v. Boak*, 39 N. S. 39, holding that the true consideration of a mortgage may be shown by parol but it must be consistent with that expressed; *Mulholland v. Williamson*, 14 Grant, Ch. (U. C.) 291, holding that the true consideration of a deed may be shown by parol, to prove that a deed was given for a consideration; *Marsh v. Hunt*, 9 Ont. App. Rep. 595; *Willard v. McNab*, 2 Grant, Ch. (U. C.) 601; *Patulo v. Boyington*, 4 U. C. C. P. 124; *Hodgins v. Hodgins*, 13 U. C. C. P. 146,—on the proof of true consideration of a deed by parol.

Cited in notes in 20 L.R.A. 105, on parol evidence as to consideration of deed; 11 E. R. C. 222, on parol evidence to contradict written instrument.

Distinguished in *Towsley v. Smith*, 12 U. C. Q. B. 554, holding that evidence that the transaction out of which the deed arose was an exchange, was inadmissible.

The decision of the Vice-Chancellor was cited in *Shaw v. Leavitt*, 3 Sandf. Ch. 163; *Newell v. Campbell*, 43 N. S. 11 (dissenting opinion), holding that true consideration for deed may be shown by parol; *Tyson v. Abercrombie*, 16 Ont. Rep. 98, holding that where a chattel mortgage recited that the mortgage was given in consideration of the payment of \$300 to the mortgagor parol evidence was inadmissible to show that the mortgage was simply intended as security for the delivery of property sold to mortgagee; *Ross v. Mason*, 9 Grant, Ch. (U. C.) 568, holding that consideration for agreement between husband and wife by which husband was to deed certain land to wife may be shown by parol, where claim is presented upon settlement of husband's estate; *Mason v. Scott*, 20 Grant, Ch. (U. C.) 84, holding that evidence is admissible to prove a valuable consideration other than that expressed in a deed of settlement between husband and wife; *Butler v. Church*, 18 Grant, Ch. (U. C.) 190 (dissenting opinion), on admissibility of parol evidence to show consideration for written instrument; *Kitchen v. Boon*, 24 Grant, Ch. (U. C.) 195, holding that parol agreement to refund excess paid for land purchased at certain price per acre, if acreage was less than that stated may be shown in action for such excess; *Phelps v. Clasen*, Woolw. 204, Fed. Cas. No. 11,074; *Williard v. McNab*, 2 Grant, Ch. (U. C.) 601; *Upper Canada College v. Boulton*, 2 U. C. C. P. 326; *Bettridge v. Great Western R. Co.* 3 U. C. Err. & App. 58,—holding that parol evidence is admissible to show true consideration for instrument; *Greenshields v. Barnhart*, 3 Grant, Ch. (U. C.) 1 (affirmed in C. R. 2 A. C. 91), holding that parol evidence is admissible to show that an assignment of a contract of sale of land by deed poll endorsed thereon was not absolute but was by way of security.

**— Of additional consideration.**

Cited in *Vail v. McMillan*, 17 Ohio St. 617; *Bank of Toronto v. Eccles*, 10 U. C. C. P. 282,—holding that additional consideration may be proved, by parol.

**Rule in equity and law the same as to admissibility of parol evidence.**

The decision of the Vice Chancellor was cited in *Fair v. Pengelly*, 34 U. C. Q. B. 611, holding that rule as to admissibility of parol evidence to alter written contract is same in equity as at law.

**Parol proof of agreement for support in consideration for deed.**

Cited in *Paine v. Chapman*, 7 Grant, Ch. (U. C.) 179, holding an agreement entered into by purchaser of realty to maintain vendor during her life might be proved although the deed stated the consideration to be one hundred pounds.

**Time for making conveyance where none specified.**

The decision of the Vice-Chancellor was cited in *Towle v. Jones*, 19 Abb. Pr. 449, 1 Robt. 87 (dissenting opinion), on reasonableness of time for making conveyance under agreement when time is not specified.

**Specific performance of oral contracts.**

The decision of the Vice-Chancellor was cited in *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459, holding that oral contracts will be specifically enforced, when case is not within statute of frauds, and no adequate remedy can be had at law.

14 E. R. C. 755, *LAMPON v. CORKE*, 5 Barn. & Ald. 606, 1 Dowl. & R. 211, 24

Revised Rep. 488.

**Recital of payment of consideration as conclusive evidence of payment.**

Cited in *Campbell v. Henry*, 45 Miss. 326, on the recital of payment of consideration in a deed as conclusive evidence of such; *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103, holding that by the consideration clause of a deed the party is estopped to allege that the deed was without consideration; *Graham v. Leslie*, 4 U. C. C. P. 176, holding that as between the parties the deed is conclusive evidence of the receipt of the sum acknowledged to have been received as a consideration; *Ketchum v. Smith*, 20 U. C. Q. B. 331, holding that receipt for purchase money by acknowledgment in the conveyance was conclusive; *McDonald v. Blois*, 9 N. S. 283, holding that the recital in the body of a deed of a receipt of the consideration is conclusive evidence of payment.

Distinguished in *Taggart v. Stanbery*, 2 McLean, 543, Fed. Cas. No. 13,724, holding that the acknowledgment of payment in a deed is conclusive evidence of payment so far as regards the effect of the deed, but not where the payment becomes a question collateral to the deed; *Eckles v. Carter*, 26 Ala. 563, holding that under the American rule, where the consideration of a bill of sale was stated to be money, it may be shown that it was property; *Harwell v. Fitts*, 20 Ga. 723, holding that in America, the recital of payment of the consideration of a deed, is not conclusive evidence of payment; *Hester v. Gairdner*, 128 Ga. 531, 58 S. E. 165, holding that where the deed recited that it was given in consideration of a certain sum, it was competent to show, under the rules in America, that it was given to secure an existing debt.

**General words in written instrument as controlled by special recitals.**

Cited in *Bailey v. Close*, 37 Conn. 408, holding that general clauses in an instrument are controlled by clauses of limitations, on the same subject matter; *Fowler v. Perrin*, 25 U. C. Q. B. 327, on the limitation of general words by a recital in a deed.

**— In general release.**

Cited in *Chamberlain v. Dempsey*, 13 Abb. Pr. 61, holding that general words are controlled by a recital in the release.

**Written receipt as conclusive evidence of payment.**

Cited in *Green v. Burtch*, 1 U. C. C. P. 313, holding that a receipt or acknowledgment of payment under seal estops the party to deny it; *Johnson v. White*, 8 Leigh, 214, on a receipt as conclusive evidence of payment; *Lowe v. Weatherley*, 20 N. C. 212 (4 Dev. & B. L.) 353, holding that a receipt under seal is conclusive evidence and cannot be explained or varied by parol.

Cited in note in 20 L.R.A. 102, on parol evidence as to receipt of consideration of deed.

Cited in 1 Beach Contr. 466, on effect of receipt under seal.

Distinguished in *Kellogg v. Richards*, 14 Wend. 115, holding that a compromise for a settlement of debts could not be explained or varied by parol.

**Construction of release according to intention of parties.**

Cited in *Caldwell v. Keith*, 10 N. B. 590, holding that circumstances surrounding giving of release were admissible to show whether or not release discharged note then in existence; *Hall v. Irons*, 4 U. C. C. P. 351, holding that the effect of a release is to be determined according to the intention of the parties as gathered from the instrument itself.

**Strict application of doctrine of estoppel.**

Cited in *Curtis v. Root*, 20 Ill. 518, to the point that estoppels were once accounted odious in law, and not allowed, unless very plainly and clearly made out; *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263, on the strict application of the doctrine of estoppel; *Goss v. Guardian Ins. Co.* Newfoundl. Rep. (1884-96) 805, holding that estoppels ought not to be allowed unless plainly and clearly established.

**Estoppel by record.**

Cited in *Missouri State L. Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93; *Evans v. Birge*, 11 Ga. 265,—holding that judgment of court is estoppel to parties thereto and their privies, if it relates to same subject matter, and decides question now at issue.

**— By deed.**

Cited in *Allen v. Pass*, 20 N. C. 207 (4 Dev. & B. L. 77), holding that receipt and acquittance under seal, contained in bill of sale for slaves, has effect of release and estops vendor from explaining or contradicting by part payment of purchase money; *Ledbetter v. Morris*, 46 N. C. (1 Jones, L.) 545, holding that a mere receipt not under seal cannot operate as an estoppel.

Cited in note in 11 E. R. C. 68, on extent of estoppel by deed.

Cited in 1 Beach Contr. 567, on estoppel by receipt of payment in deed of sum recited to be given for general release of debtor.

14 E. R. C. 760, *BOYD v. PETRIE*, 41 L. J. Ch. N. S. 378, L. R. 7 Ch. 385, 25 L. T. N. S. 460, 20 Week. Rep. 513, reversing the decision of the Master of the Rolls, reported in 39 L. J. Ch. N. S. 412, L. R. 10 Eq. 482.

**Transfer of power of sale by assignment of mortgage.**

Cited in *Chute v. Adney*, 39 N. B. 93, holding that assignment of mortgage containing power of sale transfers power of sale unless it is expressly excepted.

Cited in note in 18 E. R. C. 256, on rights and equities of assignee of mortgage.

**Effect of modification of power of sale by subsequent instrument.**

Cited in 1 Devlin Deeds 3d ed. 704, on effect of modification of power of sale by subsequent instrument.

**Release or extinguishment of power.**

Cited in Columbia Trust Co. v. Christopher, 133 Ky. 335, 117 S. W. 943, holding that any dealing with property inconsistent with exercise of power not coupled with trust or duty, will operate as implied release or extinguishment of power.

**Practice as to form of assignment of mortgage.**

Cited in Gooderham v. Traders' Bank, 16 Ont. Rep. 438, on practice in conveyancing as to form of assignment of prior mortgage to mortgagee.

**14 E. R. C. 769, DANBY v. COUTTS & CO. L. R. 29 Ch. Div. 500, 54 L. J. Ch. N. S. 577, 52 L. T. N. S. 401, 33 Week. Rep. 559.**

**Control of operative parts of writing or deed by recitals.**

Cited in Hawksley v. Outram [1892] 3 Ch. 359, 62 L. J. Ch. N. S. 215, 2 Reports, 60, 67 L. T. N. S. 804, on the contract of the operative part of a power of attorney by recitals.

Cited in notes in 22 Eng. Rul. Cas. 909, on control of general words of release by recitals; 2 Eng. Rul. Cas. 749, on control of operative part of a deed by recitals.

Distinguished in Bonnett v. Ritchie, 20 N. S. 228, holding that a condition in a bond of indemnity to a sheriff to save harmless, was not controlled by words in the recital mentioning a paper of different date.

**Term of agency.**

Cited in Macgregor v. Union L. Ins. Co. 57 C. C. A. 613, 121 Fed. 493, holding that term of employment may be inferred from provisions of written agreement although no specified term is expressly mentioned.

Cited in Reinhard Ag. 120, on termination of agency by expiration of time or happening of event.

**14 E. R. C. 776, KENDAL v. MICFEILD, Barnard Ch. 46.**

**Enlarging or restricting grant by habendum clause.**

Cited in Prindle v. Iowa Soldiers Orphans Home, 153 Iowa, 234, 133 N. W. 106, holding that the granting clause in a deed cannot be restricted.

Cited in note in 14 Eng. Rul. Cas. 787, 788, on enlarging by explaining grant by habendum clause.

Distinguished in McDonald v. McGillis, 26 U. C. Q. B. 458, holding that where the grant in the premises was of a fee, but it would be ineffectual without livery of seisin, the habendum, which was for a term of years, controlled.

**14 E. R. C. 779, GOODTITLE ex dem. DODWELL v. GIBBS, 5 Barn. & C. 709, 8 Dowl. & R. 502, 4 L. J. K. B. N. S. 284, 29 Revised Rep. 366.**

**Habendum of deed repugnant to premises.**

Cited in Winter v. Gorsuch, 51 Md. 180; Berridge v. Glassey, 16 W. N. C. 255, 42 Phila. Leg. Int. 256,—holding that if the habendum is repugnant to the premises, the latter must prevail; Jamieson v. London & C. Loan & Agency Co. 23 Ont. App. Rep. 602, on same point; Hafner v. Irwin (4 Dev. & B. L.) 570, 20 W. N. C. 433, holding that a habendum is void if repugnant to the estate granted in the premises; Chancellor v. Windham, 1 Rich. L. 161, 42 Am. Dec. 411, on the divesting of an estate previously conveyed by the premises, by a repugnant haben-

dum; Congregational Soc. v. Stark, 34 Vt. 243, holding that when the habendum clause of a deed is contradictory to the premises, it is void, but not when it explains, limits, or qualifies the premises; Boddington v. Robinson, L. R. 10 Ex. Ch. 270, 44 L. J. Ex. Ch. N. S. 223, 33 L. T. N. S. 364, 23 Week. Rep. 925, holding that a habendum is controlled by an express grant in the premises.

**— As to quantum of estate.**

Cited in Bean v. Kenmuir, 86 Mo. 666, on the limitation of an estate in fee to a life estate by the habendum as being repugnant and void.

Distinguished in Tyler Southworth v. Moore, 42 Pa. 374, holding that where the premises referred to limitations hereinafter expressed, limitations contained in the habendum did not make it void.

**Office of habendum.**

Cited in Brown v. Manter, 21 N. H. 528, 53 Am. Dec. 223, on the office of the habendum.

**Habendum operative in futuro.**

Cited in Rogers v. Eagle Fire Co. 9 Wend. 611, holding that when A devised land to B, including a horse, subject to a life estate in A and the payment of rent for the house to be occupied by B, a valid estate in futuro in the house was created; Dunlap v. Dunlap, 6 Ont. Rep. 141, holding that where the habendum gave the land to one after the death of the grantor, the deed was not void as passing only a freehold to commence in the future.

**Covenant to stand seized to the uses.**

Cited in Fish v. Sawyer, 11 Conn. 545, on a deed to a grantee and his heirs forever reserving the use and improvement of the land to the grantor during his life, as creating a covenant to stand seized to uses.

14 E. R. C. 790, CROSSING v. SCUDAMORE, 1 Vent. 137, 2 Lev. 9, 2 Keb. 754, 784, aff'd by the Exchequer Chamber reported, 1 Mod. 175.

**Words in a conveyance sufficient to pass an estate.**

Cited in Anonymous, 5 Hughes, 32, Fed. Cas. No. 449, to the point that prescription for way is not good if it does not say a quo termino ad quem the way goes; Bryan v. Bradley, 16 Conn. 474, holding that no technical or formal words are necessary, but any words that will sufficiently indicate the intention to convey; Thornton v. Mulquinne, 12 Iowa. 549, 79 Am. Dec. 548, holding that a release of all and every claim and demand against the estate of a decedent and all rights as heir, was sufficient to pass the grantor's interest; Roberts v. Roberts, 22 Wend. 140, holding that a devise of land without words of limitation but a statement that the devisee is to take a fee simple absolute, with power of unqualified disposition, gives a fee simple estate; Doe ex dem. Wilt v. Jardine, 2 N. B. 245, holding a deed whereby the releasor released to the licensee his heirs and assigns to have and to hold forever, is a good conveyance of lands; Doe ex dem. Hennesy v. Myers, 2 U. C. Q. B. O. S. 458, holding that the use of any words which show an intention of the one party to convey and of the other to accept an estate, is available to transfer the property; Vanderlinder v. Vanderlinder, 14 U. C. C. P. 129, on the use of the words, "to have and to hold unto etc," as passing right of possession to the grantee in a deed poll.

**— By way of bargain and sale.**

Cited in Rogers v. Eagle Fire Co. 9 Wend. 611, on the use of the words demise and grant as creating a bargain and sale deed.

**Construction of contracts.**

Cited in Cumberland Bldg. & L. Asso. v. Aramingo M. E. Church, 13 Phila. 171, 36 Phila. Leg. Int. 276; Fire Ins. Asso. v. Merchants' & M. Transp. Co. 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905,—holding that courts will not draw fine distinctions, or be nice about the grammatical construction of sentences in insurance contracts, in order to sustain defense in which there is no merit; Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. E. 851, holding that in considering contract of insurance courts are governed by same rules of construction which apply in construing other contracts; United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805, holding that where there is doubt as to meaning of terms employed in insurance policy, they are to be construed most strongly against company; Fisher v. Otis, 3 Pinney (Wis.) 78, 3 Chand. (Wis.) 83, holding that contracts relating to payment of money should be construed in accordance with law of place where made unless contrary intent appears.

**Construction of deeds so as to give them effect according to the intention of the parties.**

Cited in Simmons v. Augustin, 3 Port. (Ala.) 69, holding that a deed will be construed so as to give effect to the intention of the parties, and will pass the estate though technically insufficient; Edwards v. Bibb, 43 Ala. 666 (on rehearing); Russell v. Coslin, 8 Pick. 143; Townsend v. Stearns, 32 N. Y. 209; Darling v. Rogers, 22 Wend. 483; Myers v. Sea Beach R. Co. 43 App. Div. 573, 60 N. Y. Supp. 284; Bigelow v. Norton, 3 N. S. 283,—on the construction of deeds to give effect to the intention of the parties; Murray v. Kerney, 115 Md. 514, 38 L.R.A.(N.S.) 937, 81 Atl. 6, holding that consideration of natural love and affection, though not expressed, may be inferred from relation of parties expressed in deed; Hathaway v. Power, 6 Hill, 453, holding that where the land was described as a certain lot containing one hundred and sixty acres of land, it was a good conveyance of the lot, though the lot actually contained one hundred and eighty-five acres; Re Johnston [1904] 2 Ch. 234, 73 L. J. Ch. N. S. 617, 91 L. T. N. S. 124, 53 Week. Rep. 189, 11 Manson, 378, holding that a mortgage which was given as security for money for purposes ultra and also intra vires, was valid as to that part intra-vires, as such must have been the intention of the parties.

Cited in 14 Eng. Rul. Cas. 801, on construing deed so as to take effect if possible.

**Covenant to stand seized to uses.**

Cited in Vanhorn v. Harrison, 1 Dall. 137, 1 L. ed. 70, holding that deed to son in consideration of natural love and affection together with all "rights, titles, interests," etc., which grantor then had in them, to have and to hold to said son, was covenant to stand seized to use; Murray v. Kerney, 115 Md. 514, 38 L.R.A.(N.S.) 937, 81 Atl. 6, holding that, if instrument intended to convey land should be inoperative as deed, it may be effective as covenant to stand seized to uses under statute of uses; Gale v. Coburn, 18 Pick. 397, holding that consideration not repugnant to deed containing covenant to stand seized to uses; Jackson ex dem. Houseman v. Sebring, 16 Johns. 515, 8 Am. Dec. 357, on whether a covenant to stand seized to the use of a stranger was valid; Hartman v. Fleming, 30 U. C. Q. B. 209, holding that voluntary deed to daughter, reserving occupation, use, benefit and profits to grantor for his lifetime, might be construed as covenant to stand seized of reversion to use of daughter, life estate remaining in grantor.

Cited in note in 38 L.R.A.(N.S.) 938, as to when may instrument otherwise

ineffective as a conveyance of real property be upheld as a covenant to stand seized to uses.

14 E. R. C. 795, GOODTITLE ex dem. EDWARDS v. BAILEY, Cowp. Pt. 2, p. 597.

See S. C. 11 E. R. C. 48.

14 E. R. C. 803, BARTLETT v. WRIGHT, Cro. Eliz. pt. 1, p. 299.

**Property not included in descriptions as conveyed by general terms of the deed.**

Cited in Wiseley v. Findlay, 3 Rand. (Va.) 361, 15 Am. Dec. 712, on the effect of a mistake in the description of premises conveyed.

Cited in 1 Underhill Land. & T. 340, on careful description of premises in leases.

14 E. R. C. 804, DOE ex dem. SMITH v. GALLOWAY, 5 Barn. & Ad. 43, 2 L. J. K. B. N. S. 182, 2 Nev. & M. 240.

**General description of premises in deed as controlled by a special one.**

Cited in Buchner v. Buchner, 6 U. C. C. P. 314, on general description as being controlled by a particular one; Mills v. King, 14 U. C. C. P. 223, on goods, described as being in certain rooms, as being covered by a chattel mortgage though not in such rooms; Jamieson v. McCollum, 18 U. C. Q. B. 445, holding that particular description, inaccurate in many respects, could not control general description comprising whole lot; Doe ex dem. Gildersleeve v. Kennedy, 5 U. C. Q. B. 402, holding that where all the land overflowed by water was described in the deed by reference to a plan, all that contained in the plan was conveyed, though not covered by water; Oleson v. Jonasson, 16 Manitoba L. Rep. 94; Haynes v. Gillen, 21 Grant, Ch. (U. C.). 15,—holding that if premises be described in general terms and a particular description be added, the latter controls the former.

**Rejection of the false part of description.**

Cited in Patch v. White, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 710 (dissenting opinion) on the rejection of the false part of the description; Reed v. Spicer, 27 Cal. 57, holding that where the deed contains two descriptions, one of which is sufficient and the other false, in fact, the latter may be rejected; Wiley v. Lovely, 46 Mich. 83, 8 N. W. 716, holding that where the land is described by reference to a plat, and the reference was incorrect, it could be rejected if the rest of the description was sufficient; Slosson v. Hall, 17 Minn. 95, Gil. 71, holding that where the premises are conveyed by reference to a lot in a plat and there is no such block in the plat, but the land was within the corporate limits of the town, the reference to the plat will be rejected; Emerson v. White, 29 N. H. 482, on the rejection of any part as false or mistaken which is inconsistent with the clear intention of the parties; Evens v. Griscom, 42 N. J. L. 579, 36 Am. Rep. 542, holding that words descriptive of the object can not be disregarded as false description unless they are repugnant to other more important descriptive phrases; Lippett v. Kelley, 46 Vt. 516, holding that if words employed in the description of a deed sufficiently ascertained the premises intended to be conveyed, the addition of things false or mistaken will not avoid the grant; Phillips v. The Crown, 12 C. L. R. (Austr.) 287, holding that a part of a description in an application for pastoral lands which was false might be stricken out as surplusage; Connely v. Guardian Assur. Co. 30 N. B. 316, on the rejection of the false part of a description of building; Foster v. Anderson, 16 Ont. L. Rep. 565, holding that where the deed

described the property as 22 Ann. St. and the true number was 24 Ann. St., there being no number 22, that part of the description could be rejected if the remainder was sufficient; *Rowsell v. Hayden*, 2 Grant, Ch. (U. C.) 557, on the rejection of the false part of the description; *Cowen v. Truefitt* [1898] 2 Ch. 551, 67 L. J. Ch. N. S. 695, 47 Week. Rep. 29, 79 L. T. N. S. 348, holding that if there be a sufficient description of the property, any addition of a wrong or mistaken statement as to quantity, location, etc, will be rejected.

**— Error in metes and bounds and calls.**

Cited in *Cleaveland v. Smith*, 2 Story, 278, Fed. Cas. No. 2,874, holding that where the description started as from a tree on the north line, when in fact the tree was north of the north line, the description began from the tree irrespective of the other words; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, holding that, where in description of land there are found repugnant calls, instrument is not void for uncertainty, provided it clearly appears from face of deed or extrinsic facts which is true and which is false description; *McFatridge v. Griffin*, 27 N. S. 421; *Jamieson v. McCollum*, 18 U. C. Q. B. 445,—holding that a grant of land by lot and followed by a description by metes and bounds, which was false, the whole of the lot passed irrespective of later description; *Gillen v. Haynes*, 33 U. C. Q. B. 508, holding that where the land was conveyed by lot and followed by a description by metes and bounds, which left part of the lot, the description by metes and bounds would be rejected; *McPherson v. Ramsay*, 1 Has. & War. (Pr. Edw. Isl.) 288, holding that where the description read as running from a stake thirty chains from a certain point, when in fact the stake was ninety chains; the words "from the point" should not be rejected; *Mellor v. Walmesley* [1904] 2 Ch. 525, 73 L. J. Ch. N. S. 757, 52 Week. Rep. 665, 91 L. T. N. S. 317, 20 Times L. R. 695, holding that where the description read to run to the seashore, it would run to the foreshore, though the plan which it referred to was inconsistent with it.

**— Description by occupancy.**

Cited in *Marshall v. Pierce*, 12 N. H. 127, holding that a description of all lands lately owned by the wife, deceased, but occupied by the husband, did not pass lands occupied by the husband but never owned by the wife; *Drew v. Drew*, 28 N. H. 489, holding that a devise of all my homestead farm in Dover being the farm on which I now live, being the same devised to me by my father, passed all the homestead though part of it was not devised by the father.

**— Effect of falsity of description.**

Cited in *Mills v. King*, 14 U. C. C. P. 223, holding that goods described as being in certain room, and which were not in such room, did not pass under chattel mortgage.

**Incorporation by reference.**

Cited in *Doe ex dem. Gildersleeve v. Kennedy*, 5 U. C. Q. B. 402, holding that where deed referred to plan, such plan must be regarded as part of deed.

**14 E. R. C. 816, HEYDON'S CASE, 3 Coke, 7a, F. Moore 128.**

**Interpretation of statutes.**

Cited in *Ikelheimer v. Chapman*, 32 Ala. 676 (dissenting opinion); *Erwin v. Moore*, 15 Ga. 361; *Davis v. State*, 38 Md. 15 (dissenting opinion); *State ex rel. Scott v. Dircks*, 211 Mo. 568, 111 S. W. 1 (dissenting opinion); *Morton v. Forsee*, 249 Mo. 409, 155 S. W. 765 (dissenting opinion); *State v. Schuehmann*, 133 Mo. 111, 33 S. W. 35 (dissenting opinion); *Davidson v. New York*, 2 Robt.

230 (dissenting opinion); *People v. Berberrich*, 11 How. Pr. 239 (dissenting opinion); *Jones v. Crittenden*, 4 N. C. (2 Car. Law Repos. 420), 6 Am. Dec. 531 (dissenting opinion); *Floyd v. United States*, 2 Ct. Cl. 429 (dissenting opinion); *Philadelphia v. Michener*, 30 Phila. Leg. Int. 116; *Federated Engine-Drivers & Firemen's Asso. v. Broken Hill Proprietary Co.* 12 C. L. R. (Austr.) 398; *Williams v. Box*, 44 Can. S. C. 1; *Arner v. McKenna*, 9 Grant, Ch. (U. C.) 226,—for the rules of interpretation of statutes: *Kieckhoefer v. United States*, 19 App. D. C. 405, holding that where statute is clean upon its face and when standing alone it is fairly susceptible of but one construction, that construction must be given it; *Com. v. Pennsylvania, S. & N. E. R. Co.* 16 Phila. 596, 40 Phila. Leg. Int. 435; *Shohoney v. Quincy, O. & K. C. R. Co.* 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143,—holding that in construing statute court should discern what common law was, what was defect for which such law did not provide, and what remedy statute appointed to cure defect and what was reason of remedy so provided; *Decker v. Diemer*, 229 Mo. 296, 129 S. W. 936, holding that cardinal rule in construction of statutes is to get at intendment of lawmaker and enforce that intendment; *Dixey v. Philadelphia*, 38 Phila. Leg. Int. 157, holding that the true way to arrive at a sound construction of a doubtful statute is to consider the old law, the mischief, the remedy, and the true reason for the remedy; *Phelps v. Rooney*, 72 Wis. 698 (dissenting opinion), on giving such construction to a statute as shall suppress the mischief and advance the remedy; *Stocking v. Warren Bros.* 134 Wis. 235, 114 N. W. 789 (dissenting opinion), on reason for requirement, that plans and specifications of work to be done for city, be made and filed before bids are called for; *Hamilton v. Harrison*, 46 U. C. Q. B. 127 (dissenting opinion), as to rules of constructions of statutes which restrict or enlarge common law.

#### **— Penal laws.**

Cited in *Crosby v. Hawthorne*, 25 Ala. 221; *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *State v. Brooks*, 4 Conn. 446,—holding that a penal statute should be strictly construed according to the true intention of the makers; *Com. v. Loring*, 8 Pick. 370, holding that penal statutes are to be construed so as to conform to the manifest intention of the legislature; *Boag v. Lewis*, 1 U. C. Q. B. 357, on the construction of a penal statute.

Distinguished in *Atty. Gen. v. Sillem*, 2 Hurlst. & C. 431, 33 L. J. Ex. Ch. N. S. 92, 10 Jur. N. S. 262, 11 L. T. N. S. 223, 12 Week. Rep. 257, holding that the rules of construction in Heydon's case, do not apply in case of a statute creating a new offence.

#### **— Reference to previous condition of the law.**

Cited in *Lane v. Harris*, 16 Ga. 217; *Price v. Bradford*, 5 Ga. 364; *Walker v. Dailey*, 101 Ill. App. 575; *State ex rel. Bernero v. McQuillan*, 246 Mo. 517, 152 S. W. 347; *Murphy v. Mercer County*, 57 N. J. L. 245, 31 Atl. 229; *Barrett v. Winnipeg*, 19 Can. S. C. 374; *Clark v. Hoskins*, 6 Conn. 106,—holding that remedial laws are to be construed by considering what former law was, what was its mischief, and what the remedy provided, and the construction must be such as to suppress the mischief and advance the remedy; *Clark v. Hampstead*, 19 N. H. 365, holding that in the construction of statutes reference should be had to the previous condition of the law; *Finley v. Aiken*, 1 Grant, Cas. 83, on same point; *Com. v. Keuhne*, 18 Pa. Dist. R. 401, 36 Pa. Co. Ct. 487, holding that in construing statutes it is necessary to consider how law stood when statute was passed and mischief intended to be remedied; *Com. v. Pennsylvania, S. & N. E. R. Co.* 2 Chester Co. Rep. 141, 14 W. N. C. 60, 2 Dauphin Co. Rep. 283, holding that in construing a statute reference should be had to the old law to ascertain the

mischief, the remedy and the reason of the remedy; *Re Leavesley* [1891] 2 Ch. 1, 60 L. J. Ch. N. S. 385, 64 L. T. N. S. 269, 39 Week. Rep. 276, holding that in construing statutes reference should be had to former statutes; *Peek v. North Staffordshire R. Co.* 5 E. R. C. 286, 10 H. L. Cas. 473, 32 L. J. Q. B. 241, 8 L. T. N. S. 768, 11 Week. Rep. 1023; *Pelton Bros. v. Harrison* [1891] 2 Q. B. 42, 60 L. J. Q. B. N. S. 742, 65 L. T. N. S. 514, 39 Week. Rep. 689; *Re Mayfair Property Co.* [1898] 2 Ch. 28, 67 L. J. Ch. N. S. 337, 78 L. T. N. S. 302, 46 Week. Rep. 465, 5 Manson, 127, 14 Times L. R. 336; *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, 25 E. R. C. 240, [1898] A. C. 571, 67 L. J. Ch. N. S. 628, 79 L. T. N. S. 195,—holding that reference must be had to the previous condition of the law to ascertain the reason for the proposed remedy.

Distinguished in *Bradlaugh v. Clarke*, 1 E. R. C. 667, L. R. 8 App. Cas. 354, 52 L. J. Q. B. N. S. 505, 48 L. T. N. S. 681, 31 Week. Rep. 677, holding that in the interpretation of statutes the courts can not refer to preceding laws so as to give a result contrary to that intended by the legislature.

— **With reference to the common law.**

Cited in *Bank of United States v. Lee*, 13 Pet. 107, 10 L. ed. 81; *Baker v. Holderness*, 26 N. H. 99; *Burgett v. Burgett*, 1 Ohio, 469, 13 Am. Dec. 634,—holding that the construction of a statute should be made with reference to the common law, so as to discover the mischief sought to be remedied; *Com. v. Burrell*, 7 Pa. 34, holding that where there had been no previous law on the subject, reference would be had to the common law; *M'Kinney v. Reader*, 7 Watts, 123, holding that the best interpretation is that which conforms to the common law; *Moran v. Com.* 9 Leigh, 651, holding that statutes are to be construed according to the principles of the common law; *Madden v. Nelson & Ft. S. R. Co.* 5 B. C. 541, to the point that statutes are not presumed to make any alteration in common law further or otherwise than act expressly declares.

— **Reference to purpose of law and defect intended to be cured.**

Cited in *Powers v. State*, 129 Ala. 126, 29 So. 784, holding that in the interpretation of statutes the purpose of the statute should be sought to be obtained; *McKissack v. McClendon*, 133 Ala. 558, 32 So. 486, holding that that construction should be adopted which will best accomplish the object of the statute; *Buckner v. Real State Bank*, 5 Ark. 536, 41 Am. Dec. 105, holding court bound to look to the former mischief, the proposed remedy and the reason for the change; *Underhill v. Manchester*, 45 N. H. 214, holding that the construction of a statute should be made with reference to the object of the statute; *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Britton v. Lorenz*, 3 Daly, 23,—holding that reference be had to the defect and mischief which it is to remedy; *People v. Berberrich*, 20 Barb. 224, holding that it is duty of judges in construing remedial statutes to keep in view its purpose as such statute; *Huston v. Scott*, 20 Okla. 142, 94 Pac. 512, holding that in the construction of statutes the remedy and the mischief which is aimed at should be sought to be obtained; *Huffman v. State*, 29 Ala. 40; *Sprowl v. Lawrence*, 33 Ala. 674; *Easley v. Bone*, 39 Mo. App. 388; *Philadelphia v. Michener*, 10 Phila. 30, 30 Phila. Leg. Int. 116; *Blake v. Heyward*, Bail. Eq. 208; *Lincoln v. Smith*, 27 Vt. 328; *Com. v. Peas*, 2 Gratt. 629; *McClure v. United States*, 19 Ct. Cl. 18; *Crothers v. Monteith*, 11 Manitoba L. Rep. 373; *Doc ex dem. Kerr v. McCulley*, 8 N. B. 508,—holding that it is the duty to make such construction as should repress the mischief and advance the remedy; *Muller v. Shibley*, 13 B. C. 343, holding that in construing Woodman's Lien Act, evil aimed at may be looked at; *Turner v. Lucas*, 1 Ont. Rep. 623, to the point that bankrupt who actively enables judgment to be taken against him violates statute and renders

judgment invalid; *Wills v. Carman*, 14 Ont. App. Rep. 656, holding that nominal damages should not be added by court in libel action where jury find verdict that defendant was guilty of libelling, but that plaintiff sustained no damage; *Waters v. Shale*, 2 Grant, Ch. (U. C.) 457, holding that statutes should be construed to provide the remedy for the defect which it was to cure; *Re Liquor Act*, 13 Manitoba L. Rep. 239, on the same point; *Bruce v. Ailesbury*, 14 E. R. C. 822, 24 E. R. C. 92, [1892] A. C. 356, 67 L. T. N. S. 490, 57 J. P. 164, 62 L. J. Ch. N. S. 95, 1 Reports, 37, 41 Week. Rep. 318, holding that the canons of construction require the contemplation of the cause and reason for the act, and the remedy.

#### —Reference to title.

Cited in *Smythe v. Fiske*, 23 Wall. 374, 23 L. ed. 47, holding that where doubt exists as to meaning of statute title may be looked to in order to find out its meaning.

#### —To carry out intention of the legislature.

Cited in *French v. Gray*, 2 Conn. 92; *Weeks v. United States*, 2 Ind. Terr. 162, 48 S. W. 1036; *Morris & C. Dredging Co. v. Jersey City*, 64 N. J. L. 587, 46 Atl. 609; *Smith v. Helmer*, 7 Barb. 416; *People v. Schoonmaker*, 63 Barb. 44,—holding that a statute should be construed according to the intention of the legislature; *Underwood v. Green*, 3 Robt. 86 (dissenting opinion); *Collins v. Henderson*, 11 Bush, 74; *Barrett v. Winnipeg*, 7 Manitoba L. Rep. 273 (dissenting opinion); *Reid v. Whitehead*, 10 Grant, Ch. (U. C.) 446,—on same rule of construction; *Lisbon v. Clark*, 18 N. H. 234, holding that the will of the legislature should be the thing sought and applied; *Super v. Strauss*, 17 Pa. Dist. R. 333, holding that the intention of the legislature and the object aimed at are to control judicial construction; *State v. Nerland*, 7 S. C. 241; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670,—holding that acts are to be construed to effectuate the manifest intention of the legislature; *Reed v. Allerton*, 3 Robt. 551 (dissenting opinion), on the rule of construction according to intention; *United States v. Falkenhainer*, 21 Fed. 624, holding that the court would pass by the letter of the statute to attain the object intended by the law making body; *River Wear Comrs. v. Adamson*, 1 E. R. C. 308, 47 L. J. Q. B. N. S. 193, L. R. 2 App. Cas. 743, 37 L. T. N. S. 543, 26 Week. Rep. 217, 3 Asp. Mar. L. Cas. 521; *R. v. Castro*, L. R. 9 Q. B. 350, 43 L. J. Q. B. N. S. 105, 30 L. T. N. S. 320, 22 Week. Rep. 187, 12 Cox, C. C. 454; *R. v. Holbrook*, L. R. 4 Q. B. Div. 42, 48 L. J. Q. B. N. S. 113, 39 L. T. N. S. 536, 27 Week. Rep. 313, 14 Cox, C. C. 185; *Harding v. Preece*, L. R. 9 Q. B. Div. 281, 51 L. J. Q. B. N. S. 515, 47 L. T. N. S. 100, 31 Week. Rep. 42, 46 J. P. 646,—holding that it is the duty of the courts to ascertain the intention of the legislature and to give effect, if possible, to that intention in construing statutes.

#### Judicial notice of purpose of statute.

Cited in *State v. Haskell*, 84 Vt. 429, 34 L.R.A.(N.S.) 286, 79 Atl. 852, holding that court will take judicial notice of fact that statute prohibiting of depositing of mill refuse in river to which fish resorted to spawn was to prevent injury to or destruction of fish.

#### What is subject to execution.

Cited in *Payn v. Beal*, 4 Denio, 405, holding that rent reserved upon conveyance in fee of land, is not subject to lien of judgment, nor liable to be sold on execution though conveyance contain clause of distress and provision for re-entry.

Cited in note in 11 Eng. Rul. Cas. 678, on necessity of setting out by metes and bounds lands taken in execution under an elegit.

**— To sequestration.**

Cited in London & C. Loan Co. v. Morphy, 10 Ont. Rep. 86, holding that seats at board of stock exchange cannot be reached by sequestration.

14 E. R. C. 822, BRUCE v. AILESBOURY. See s. c. 24 E. R. C. 92.







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